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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 216.

C. G. BALLENTYNE AND HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANTS,

vs.

WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MARCH 6, 1906.

(20,117.)

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INDEX.

	Original.	Print.
Proceedings in the circuit court of the first judicial circuit of the Territory of Hawaii	1	1
Bill of complaint	1	1
Exhibit A—Deed of trust from the Pacific Heights Electric Railway Company to William O. Smith, trustee, April 1, 1902	18	11
Exhibit B—Deed from Charles S. Desky to the Pacific Heights Electric Railway Company, January 25, 1902	38	21
Summons and return	42	24
Answer of the Honolulu Rapid Transit and Land Company	43	25
Decree for foreclosure	49	28
Commissioner's return and account of sales	64	36
Commissioner's account	68	38
Exhibit D—Statement of account	70	39
A—Affidavit of publication	72	40
B—Notice of sale	73	42

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	Original.	Print.
Motion to confirm sale	75	44
Objections of William O. Smith, trustee, to confirmation of sale	76	44
Protest of the Pacific Heights Electric Railway Company and Charles S. Desky	79	46
Decision and order confirming sale in part, &c	82	47
Notice of appeal	90	51
Opinion	91	52
Citation	103	59
Appeal and allowance of same	104	60
Acceptance of service of citation	105	60
Assignment of errors	106	61
Clerk's certificate	110	62

1 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

Stamps, $2.00.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Honolulu, in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (Also Known as Ellen Polyblank), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents.

Bill for Foreclosure of Trust Deed.

To the Honorable Presiding Judge of the Circuit Court of the First Circuit, Territory of Hawaii, sitting at Chambers, in Equity.

William O. Smith, of Honolulu, Territory of Hawaii, Petitioner above named, humbly complaining unto your Honor against The Pacific Heights Electric Railway Company, Limited, an Hawaiian corporation, August Dreier, Honolulu Rapid Transit and Land Company, Limited, an Hawaiian corporation, Sister Albertina (also known as Ellen Polyblank) as Trustee for Stella K. Cockett, and Charles S. Desky, Respondents above named, respectfully shows:

I.

That the Respondent The Pacific Heights Electric Railway Company, Limited, is, and ever since the 25th day of January,
2 1902, has been a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii.

That the Respondent, Honolulu Rapid Transit and Land Company, Limited, is, and during all the times herein mentioned, a like corporation.

That the Respondent, August Dreier, is a resident of said Honolulu.

That the Respondent, Sister Albertina (also known as Ellen Polyblank), as Trustee for Stella K. Cockett, and said Respondent, Charles S. Desky, are residents of said Honolulu.

II.

That on the first day of April, A. D. 1902, the said Respondent, The Pacific Heights Electric Railway Company, Limited, did duly execute and deliver to your petitioner, the said William O. Smith, a certain Deed of Trust or Mortgage, dated on said day and which was on the 25th day of April, 1902, duly filed for record and

recorded in the Office of the Registrar of Conveyances in said Honolulu in Liber 237, on pages 29 to 39, wherein and whereby the said The Pacific Heights Electric Railway Company, Limited, did convey to your petitioner, as trustee, upon the terms in said deed of trust set forth, hereinafter particularly mentioned, all and singular the railway system, equipment, and appurtenances, then known as the Pacific Heights Electric Railway, a railway beginning at the junction of Kaiulani Drive, a private way, and Booth road, at Pauoa, said Honolulu, and running up and along said Kaiulani Drive two and one-half miles, more or less, following the windings of said road, to the summit station of said railway; and also all rights of way, sidings, stations, track, poles, wires, hangers, appurtenances, power house, steam plant, power generator, spare armature light generator, two passenger cars, two freight cars, two passenger cars
3 in course of construction, all station buildings, car sheds and other structures, and all tools, machinery, extra parts, rails, fish plates, stock on hand, blacksmith shop, chattels and supplies of every kind belonging to or appurtenant to said railway; and also all of the tracts of land to The Pacific Heights Electric Railway Company, Limited, conveyed by deed of Charles S. Desky, dated January 25, 1902, (a copy of said deed being hereunto annexed and marked Exhibit "B," hereby referred to and made part hereof); and also all other property to be acquired by said The Pacific Heights Electric Railway Company, Limited, after the making of said deed of trust, for the use of said railway as then constructed; and also all franchises of said The Pacific Heights Electric Railway Company, Limited; the said Deed of Trust having so conveyed all and singular the said property and interests unto your petitioner, he to have and hold the same in trust for the equal and proportionate benefit and security of the holders of all the bonds then intended to be issued by said The Pacific Heights Electric Railway Company, Limited, upon the vote of the stockholders thereof and intended to be secured by said deed of trust, to the amount in aggregate of $50,000., that is to say: bonds of the denomination of $1,000. each, aggregating $50,000., and the interest thereon, the said bonds to bear date the 1st day of April, 1902, and to bear interest at the rate of 6% per annum, payable in equal installments on the first days of October and April in each year, according to the interest coupons attached to and made part of said bonds, principal and interest to be payable in United States gold coin; the said trustee further holding said property so conveyed in trust for the enforcement of the terms of said bonds when payable and the performance of and compliance with the covenants and conditions of said deed of trust.

III.

That in said Deed of Trust it is provided and declared
4 that the said The Pacific Heights Electric Railway Company, Limited, shall duly pay to every holder of any bond issued as aforesaid and secured by said deed, the principal and interest accruing thereon as the same become due and payable; and also that

said The Pacific Heights Electric Railway Company, Limited, will pay and discharge all taxes and assessments which may be assessed upon and against the tangible property of said Company, without deducting the same from said bonds or interest.

IV.

That in said Deed of Trust it is further provided that until default shall have been made in the punctual payment of the interest or principal of any of the bonds thereby secured, or in the due performance and observance of any of the covenants and conditions therein contained on the part of said The Pacific Heights Electric Railway Company, Limited, to be performed and observed, that said Company, its successors and assigns shall be permitted to retain actual possession of the railway and premises conveyed by said indenture, and to manage, control, operate and use the same, and to collect and use all tolls, earnings, income and profit to be derived therefrom.

V.

That in said Deed of Trust it is further provided: that in case default shall be made by said Company

"(1) In the payment of interest upon any bond or bonds secured by this indenture and such default shall have been continued for a period of thirty days, or in case,

"(2) Default shall be made in the payment of the principal of any of said bonds or bond when the same becomes due, or in case,

"(3) Default shall be made in the due observance or performance of any covenant herein contained on the part of said company, and such default shall have continued for a period of thirty days after written notice thereof to said company from said trustee or from the holders of five per cent. in amount of the bonds secured hereby;

"Then, and in each and every such case said trustee may enter upon and take possession of said railway and of the rolling stock and other property conveyed by this indenture or intended so to be, and may exclude said company, its agents and servants wholly therefrom, and may use, manage, operate and control said railway and all property pertaining to the same or conveyed by this indenture in such manner and for such length of time as to said trustee shall seem best, and may from time to time at the expense of the trust estate maintain and restore the rolling stock, tools, machinery, buildings, bridges, tracks, and other property of said company in such manner as to said trustee shall seem expedient and may make all other necessary or proper outlays in connection with the operation of said railway and may exercise all powers which said company has as a corporation or otherwise, and in his discretion said trustee may upon the request of the holders of a majority in amount of the bonds secured by this indenture and upon notice in writing to said company declare the principal of all of said bonds at once due and payable and may thereupon sell to the highest bidder all and singular the said railway, chattels, property and effects conveyed by this in-

denture or intended so to be, after having advertised by public notice published in two newspapers published in said Honolulu a notice of the time and place of the proposed sale, such notice to be published for the period required by law in the case of mortgage foreclosures, and may from time to time postpone any sale advertised as aforesaid, and with or without further notice make the sale at such time and place as to said trustee may seem best, and may upon the completion of any such sale execute and deliver to the purchaser or purchasers of said property or of any portion of the same good and sufficient conveyances which conveyances shall forever bar
6 and foreclose any equity of redemption existing in favor of said company.

"Any sale made under and by virtue of this indenture whether under the power of sale hereinbefore granted or under and by virtue of judicial proceedings shall operate to divest all right, title, interest and estate, either at law or in equity, of said company in and to the property sold."

That a copy of said Deed of Trust is hereto annexed, hereby referred to, marked Exhibit "A," and made part hereof.

VI.

That after the execution and delivery of said Trust Deed by said The Pacific Heights Electric Railway Company, Ltd. to your petitioner as Trustee, as aforesaid, said The Pacific Heights Electric Railway Company, Ltd. did, on the 1st day of April, 1902, issue, negotiate and sell its certain bonds, being a series of 6% 20-year gold bonds, for $1000. each, to the aggregate amount of $50,000., the whole of which are now issued and outstanding and in the hands of *bona fide* holders, to-wit: Forty of said bonds are now owned by Cecil Brown, Trustee, of said Honolulu, and Ten of said bonds are now owned and held by F. M. Hatch, of Honolulu.

VII.

That said The Pacific Heights Electric Railway Company, Ltd. has made default in the payment of the interest upon said bonds, which did become due and payable at the times and in the sums following, to-wit:

On October 1, 1902, in the sum of $1200.,
On April 1, 1903, in the sum of $1200.,
On October 1, 1903, in the sum of $1200., and
On April 1, 1904, in the sum of $1200.,

Amounting in all as unpaid interest to the sum of $4800.

That demand has been made upon said The Pacific Heights Electric Railway Company, Limited, by the said holders of the said bonds, to-wit: by said Cecil Brown, Trustee, on behalf of him-
7 self and said F. M. Hatch, for the payment of said interest hereinabove alleged to be due and unpaid, and that on the

21st day of June, 1904, written notice was also duly given by said bondholders to said The Pacific Heights Electric Railway Company, Limited; that in case said unpaid interest be not paid at once, notice of said non-payment and default would be given to your petitioner as Trustee under said Trust Deed, with a request that said Trustee take possession of the said railway, in pursuance of the terms of said Trust Deed, and that foreclosure thereof, or such other proceedings, be had, as may be necessary or proper to protect the interest of the bondholders.

That said Company did fail and neglect to pay the said interest on said bonds as demanded, as aforesaid, and still fails and neglects so to do.

VIII.

That on the 2nd day of July, 1904 your petitioner was informed by the said Cecil Brown and F. M. Hatch, bondholders as aforesaid, that default had been made by said The Pacific Heights Electric Railway Company, Limited, in the payment of the said interest due and accrued on said bonds, demand having been made upon said Company for payment of the same, and such payment refused; and said bondholders did then, on said 2nd day of July, 1904, request your petitioner as Trustee under said Deed of Trust, to forthwith take possession of the property and premises in and by said Trust Deed described and conveyed, pursuant to said Deed of Trust.

IX.

That on said 2nd day of July, 1904, and immediately upon receipt by your petitioner of the said notice and request to your petitioner given and made by said Bondholders, your petitioner did give notice to said The Pacific Heights Electric Railway Company, Limited, by directing the same to C. S. Desky, Esq., then President of said Company, that unless all interest then due upon said
8 bonds be forthwith paid, your petitioner would proceed to take possession of the said property and premises in accordance with the provisions of said deed.

X.

That the said The Pacific Heights Electric Railway Company, Limited, did then, on said 2nd day of July, 1904, inform your petitioner that it was unable to pay the said interest on said bonds.

That thereupon, on said last named day, your petitioner, as trustee under said deed, did enter into and upon, and take over and into his possession and control, all and singular the property and premises in and by said Trust Deed described and referred to (save as to certain property hereinafter particularly mentioned in paragraphs XII and XIII of this Bill), and ever since said last mentioned day your petitioner has remained in possession and charge of the same.

XI.

That immediately on taking possession of said property as aforesaid, your petitioner did cause an examination to be made of the

same and of the state and condition of said railroad, and your petitioner is informed and believes that the said railway was then and there in an unsafe and dangerous condition and that the same could not continue to be operated as a railway without great danger to the lives and limbs of persons riding thereon or operating the cars thereon, and without danger of loss and destruction of the cars and other equipment used in connection therewith; in that many of the ties imbedded in said roadway were rotted and disintegrated and broken and cut into by rails and plates, guard rails on many curves badly worn, rail spikes loose and partly drawn, rails in many places not resting on or fastened to the ties, ties on sharpest curves too short, ballast principally of broken rock filled in between ties too large, and also other and further and general repairs being
9 necessary, for the safe and efficient operation of said railway; and also your petitioner is informed and believes and therefore alleges that because of the steep grades on said railway, they being from 6.1 ft. to 6.8 ft. per 100 feet maximum, it was necessary as a precaution for the safety of persons riding on said cars that every motor car be equipped with some proper and efficient automatic air brake (in addition to hand brakes). That your petitioner did then cause to be submitted to him certain estimates of the amount of cost which would then have been necessary to have put said railway in good condition and repair for the safe and efficient operation thereof, and your petitioner is informed and believes and therefore alleges that the sum of $5,500. was then necessary for such repair and reinstatement thereof sufficient for the safe use and operation of the same.

That your petitioner is informed and believes and therefore alleges that at said time and now said The Pacific Heights Electric Railway Company, Limited, was and is altogether without money and means of obtaining money wherewith to make said repairs or operate said road.

That your petitioner did endeavor to obtain money wherewith to make the said necessary repairs for the continuation of the operation of said railway, but was and is unable to do so, and on the advice, consent and request of said Bondholders, your petitioner did, on the 17th day of August, 1904, pursuant to the terms of said trust deed, declare the principal of all of the said bonds at once due and payable, giving written notice thereof to said The Pacific Heights Electric Railway Company, Limited, together with notice of the intention of your petitioner as trustee as aforesaid, to proceed to sell the property in said deed described.

XII.

That on or about the 30th day of January, 1904, and after
10 the making of said Deed of Trust, said The Pacific Heights Electric Railway Company, Limited, by Chas. S. Desky, its President, and Joseph G. Pratt, its Treasurer, did make, execute and deliver to the above named Respondent, August Dreier, an instrument in writing wherein and whereby said corporation did sell and convey to said August Dreier, for the therein recited consideration

of $625. a certain *Steam Condenser* (pump) of the value of about $625., then in good order and condition, then situate, located and being used by said The Pacific Heights Electric Railway Company, Limited, in its power house at the foot of Kaiulani Drive in Pauoa Valley, Honolulu, and under said instrument did deliver the same to said August Dreier, which said article was then and there subject to the prior lien and charge of the said Trust Deed, the said sale having so been made without the knowledge or consent of your petitioner, as trustee under said deed, and during the temporary absence of your petitioner from the Territory of Hawaii and without the knowledge or consent of said Bondholders. That said August Dreier did then remove said Steam Condenser from the premises of said The Pacific Heights Electric Railway Company, Limited, and carry away the same to his own premises, and he does now continue to have and hold the same against the will and consent of your petitioner, as such trustee, and has refused and does still refuse to surrender the same to your petitioner, although thereto duly requested.

XIII.

That on or about the 27th day of June, 1904, the said Charles S. Desky did make, execute and deliver to the above named Respondent, Honolulu Rapid Transit and Land Company, Limited, an instrument in writing purporting to be a bill of sale and conveyance to said Honolulu Rapid Transit and Land Company, Limited, of a 5593 foot—4021 lbs. 4/0 Triple Braid Weather Proof Cable of the value of about $1,000., in good order and condition, then belonging to and being the property of the said The Pacific Heights Electric Railway Company, Limited, and then and there being property theretofore conveyed by and included in said Trust Deed to your petitioner, subject to the prior and first lien and charge of said Trust Deed, said cable being then in use and in the possession of said Honolulu Rapid Transit and Land Company, Limited, by agreement with The Pacific Heights Electric Railway Company, Limited; said sale or purported and attempted sale having been made without the knowledge or consent of your petitioner as Trustee as aforesaid, and without the knowledge or consent of said Bondholders. That the said cable last referred to, was and is the same cable as heretofore installed and in use by said Honolulu Rapid Transit and Land Company, Limited, along a certain route in said Honolulu beginning at King and Liliha Streets and running up Liliha Street to a point near David Dayton's residence, and then across intervening land and along Bates Street to Nuuanu Street and thence to the lower terminus of the railway of said The Pacific Heights Electric Railway Company, Limited, at Pauoa. That under said purported instrument and attempted sale the said Respondent Honolulu Rapid Transit and Land Company, Limited, does now have and hold in its possession, and ever since said 27th day of June, 1904, has held, and does now claim to be the owner of the said cable, and has refused and does still refuse to surrender or deliver the same to your petitioner as such Trustee, although thereunto duly requested by your petitioner.

11

That the said cable was conveyed to said The Pacific Heights Electric Railway Company, Limited, by deed of said Charles S. Desky, dated the 25th day of January, 1902, and on the 25th day of April, 1902, filed for record and recorded in the said Registry of Conveyances in said Honolulu, in Liber 234 on pages 323-
12 326.

XIV.

That your petitioner is informed and believes, and upon such information and belief alleges that said The Pacific Heights Electric Railway Company, Limited, is the owner of certain rails and overhead wire or cable, and wire hangers, the same being the rails and overhead current wire and wire hangers now laid and installed upon and constituting the track and overhead wire and hangers now upon and along a certain strip of land situate at Kahookane, Nuuanu, omre particularly described in a certain deed made by the Hawaiian Government to Charles S. Desky, dated the 18th day of August, 1902, recorded in said Registrar's Office in Liber 254 on pages 328 *et seq.*, said track being an adjunct to said The Pacific Heights Electric Railway Company, Limited's railway, and running from the lower end of said last mentioned railway to Nuuanu Street, the said rails, wire and hangers having been and being the property of said The Pacific Heights Electric — Company, Limited, and being a part of the property included in and conveyed by said Trust Deed to your petitioner, and having been incorporated and used in the construction of said adjunctive track over said strip of land without the knowledge or consent of said Trustee, and your petitioner alleges that the same are still subject to the lien and charge of said Deed of Trust.

That said respondent Sister Albertina (also known as Ellen Polyblank) as Trustee for Stella K. Cockett, and said respondent Charles S. Desky do severally claim some right or interest in some part or portion of said rails, wire and hangers last referred to, the extent of which claims is not fully known to your petitioner, but your petitioner alleges that such claims are subsequent to the right of your petitioner in and to said last mentioned property and to the
13 prior lien of said Deed of Trust.

XV.

That prior to the time of the making of said Deed of Trust, there was made and given by said Charles S. Desky, Grantor of said The Pacific Heights Electric Railway Company, Limited, a certain mortgage upon the tracts of land to said The Pacific Heights Electric Railway Company, Limited, conveyed by said Desky described in said deed hereto annexed and marked Exhibit "B" to C. W. Booth, which said mortgage was dated the 22nd day of September 1900, and recorded in said Registry Office in Liber 214 on page 218.

That the lien and charge of said mortgage to said C. W. Booth was by said Booth on the 3rd day of December 1902, released and discharged with respect to all the roadway and right of way for tracks and poles as on said last named date occupied by said The Pacific Heights Electric Railway Company, Limited, by its Electric Railway and appurtenances, extending along the full length of the roadway

known as Kaiulani Drive on said "Pacific Heights," and also those tracts and parcels of land on which the Power House and Stations of said The Pacific Heights Electric Railway Company, Limited now stand; said Power House lot being 50 by 50 feet, and also with respect to the several station sites of said railway; said Partial Release of Mortgage being recorded in said Registry Office in Liber 239 on page 457.

That said mortgage to said C. W. Booth was heretofore by decree of the Circuit Court foreclosed by said C. W. Booth and all the remaining property not specifically released from said mortgage was sold under said foreclosure.

14 Wherefore, your petitioner prays that after due and regular hearing hereof, and the adduction of proofs of the allegations herein contained, this Court do make its order and decree:

That all and singular the allegations hereinabove set forth and contained are true;

That default has been made by the said respondent The Pacific Heights Electric Railway Company, Limited, in the payment of the interest now due and unpaid on its said bonds, said interest having become due at the times and in the sums hereinabove in Paragraph VII of this bill alleged; and that the principal of all of said bonds has by said William O. Smith, Trustee under said Deed, been declared to be, and that the same is now wholly due and payable;

That the said Trust Deed was made, and the property and interests thereby conveyed were so conveyed, to secure the payment of the principal and interest of said bonds when the same should become due under the provisions of said Trust Deed, and that said Trust Deed was and is a first and prior lien and charge on said property and interests thereby conveyed.

That the said Steam Condenser hereinabove in Paragraph XII alleged to have been sold by said respondent The Pacific Heights Electric Railway Company, Limited, to said respondent August Dreier, as therein averred was at the time of said alleged sale and still is, a part of the property by said Trust Deed conveyed to your petitioner as Trustee as aforesaid, and was and is subject to the prior and first lien and charge of said Deed of Trust thereon, notwithstanding said alleged sale thereof;

That the said 5593 feet. 4021 lbs. of 4/0 triple braid weather proof cable mentioned and described in Paragraph XIII of
15 this Bill, therein alleged to have been made the subject of an attempted sale by said Charles S. Deksy to said Respondent Honolulu Rapid Transit and Land Company, Limited, was, at the time of said attempted sale, and still is the property of said The Pacific Heights Electric Railway Company, Limited, and not of said Charles S. Desky, and that by said attempted sale no right, title or interest therein or thereto did pass or become transferred to said respondent Honolulu Rapid Transit and Land Company, Limited, and that the same was at said time, and still is, a part of the property by said Trust Deed conveyed to your petitioner as Trustee, as aforesaid, and was and is subject to the prior and first lien and charge of said Deed of Trust thereon, and that said Respondent Honolulu Rapid Transit and Land Company, Limited,

does hold the same unlawfully against the right and demand of your petitioner as such Trustee to the same, and that said last named Respondent be ordered and directed by this Honorable Court to forthwith surrender and deliver up the same to your petitioner upon his demand. That your petitioner further have judgment against said last named Respondent for the reasonable rental and use of said cable since the said 27th day of June 1904, at the rate of six per cent. (6%) per annum on the value thereof until surrendered to your petitioner.

That your petitioner as Trustee under said Deed of Trust, be allowed and directed to sell all and singular the said property and interests in and by said deed of trust to him conveyed as such Trustee, including also the said Steam Condenser hereinbefore alleged to have been sold to said Respondent August Dreier without the consent of said Trustee, and also the said cable hereinbefore alleged to have been attempted to be sold to said Respondent Honolulu Rapid Transit and Land Company, Limited, and also all the right, title, interest, claim and demand of said The Pacific
16 Heights Electric Railway Company, Limited, in and to the said rails, wire and hangers now forming a part of and incorporated in said adjunctive railway connecting said Pacific Heights Railway with Nuuanu Avenue, and that your petitioner, as Trustee under said Deed be allowed and directed to use and apply the proceeds of such sale after payment of the costs of this suit in manner as directed in and by said Trust Deed in case of any such sale; and that in case the proceeds of such sale, after payment of expenses of suit and sale shall be insufficient to pay the interest and principal of said bonds in full, and it shall appear from the return of sale of your petitioner that a deficiency exists, that judgment may be docketed in favor of your petitioner, as such Trustee, against said Respondent The Pacific Heights Electric Railway Company, Limited, for the amount of such deficiency, and that execution may issue therefor.

That your petitioner be allowed and directed to make, execute and deliver to the purchaser or purchasers of the property so sold, a good and sufficient deed or deeds or other instruments of conveyance and assignment of the same, and that said purchasers be let into and have possession of the property by them respectively purchased at said sale, upon production of such deed or conveyance of the same.

That the said Respondents, and each and every one of them, and any and all persons claiming by, through, or under them or any of them, be forever barred and foreclosed of and from all right, title, interest, claim and equity of redemption in and to the aforesaid property and every part thereof;

That your petitioner may h-ve such other and further relief in the premises as may be just and in accordance with equity.

17 That said Respondents and each of them be cited to appear and a full, true and sufficient answer made to this petition.

Dated the 10th day of September 1904.

(Signed) WILLIAM O. SMITH,
Trustee, Petitioner.

(Signed) LOUIS J. WARREN,
Attorney for Petitioner.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

William O. Smith, of Honolulu, Territory of Hawaii, being first duly sworn, deposes and says, that he is the Petitioner and Trustee named and referred to in the foregoing Petition; that said Petition has been read to him and he knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein alleges upon information and belief, and as to those matters he believes it to be true.

(Signed) WILLIAM O. SMITH.

Subscribed and sworn to before me this 10th day of September, 1904.

[SEAL.] (Signed) WM. J. FORBES,
Notary Public, First Judicial Circuit.

18 Stamps $139.

EXHIBIT "A."

Deed of Trust.

The Pacific Heights Electric Railway Company Limited.

An indenture made this first day of April, A. D. 1902 by and between The Pacific Heights Electric Railway Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, having its place of business at Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated "said company," party of the first part, and William O. Smith of said Honolulu, hereinafter designated "said trustee," party of the second part.

Whereas "said company" is a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii, having power to hold real estate, and to borrow money and to give deeds of trust to secure the same; and

Whereas said company has purchased from Charles S. Desky of said Honolulu the Pacific Heights Electric Railway and in accordance with the terms of said purchase has agreed to issue bonds to the amount of $50,000.00 as part of the purchase price of said railway; and

Whereas the Board of Directors of said company at a regularly called meeting of said Board held at said Honolulu on the twenty-seventh day of February A. D. 1902, at which a quorum of said Directors were present, unanimously resolved that a meeting of the stockholders of said company should be held at the office of Messrs. Hatch & Silliman in Honolulu on March third, 1902, for the purpose, with other business, of considering the authorization of an issue of bonds to the amount of Fifty Thousand Dollars ($50,000.00) to complete the terms of the purchase of the Pacific Heights Electric Railway;

And Whereas in pursuance of said resolution of the Di-
19 rectors the following notice was delivered to each stockholder by the Secretary:

"*Notice of Stockholders' Meeting.*

"In accordance with a resolution of the Board of Directors you "are notified that there will be a meeting of the stockholders of The "Pacific Heights Electric Railway Company, Limited at the office "of Hatch & Silliman in Honolulu, on Monday March 3d at 11:30 "o'clock A. M.

"Business:

"1. The adoption of By-laws.

"2. The authorization of an issue of bonds to the amount of "$50,000.00 to complete the terms of the purchase of the Pacific "Heights Electric Railway from Charles S. Desky according to "agreement, and the authorization of a deed of trust to secure such "bonds.

"J. G. PRATT, *Secretary.*"

And Whereas on the third day of March, 1902, at 11:30 o'clock A. M. at the office of Hatch & Silliman in said Honolulu being the time and place named in said notice, a meeting of the stockholders of "said company" was held at which all shares but one were represented, said meeting was deferred until four o'clock P. M. of the same day at the same place; and whereas at four o'clock P. M. of said day at said place a meeting of the shareholders of "said company" was held at which all of said shareholders were present or were represented by proxy or by power of attorney, and a written consent to said meeting was signed by or on behalf of all of said shareholders.

And Whereas at said meeting of stock holders the following resolutions were adopted by unanimous vote:

"Resolved: That for the purpose of carrying out the pur-
"chase from Charles S. Desky of the Pacific Heights Electric "Railway in accordance with the terms of the contract made between "this company and said Desky, the directors be authorized to issue "fifty First Mortgage Coupon Bonds of the sum of one thousand dol-"lars each, payable in twenty years from date, with the option of re-"demption from and after the expiration of ten years from date, said "bonds to be signed in the name of the company by the President "and Treasurer, and to bear interest at the rate of six per cent. per "annum, payable semi-annually, according to the coupons to be "made a part of said bonds, principal and interest to be payable in "gold coin of the United States of the present standard weight and "fineness."

"Resolved: That for the purpose of securing said bonds the Di-"rectors be authorized to execute and deliver to William O. Smith "Esq. as trustee a deed of trust in such form as the Directors may see "fit upon all of the property real and personal now owned by the "company and the franchises of this company and upon all "of this company's rights of way, track, poles, wires, rolling stock, "stations, station sites, power plant, power site and building and "chattels and upon all property hereafter to be acquired for the use "of said railway as now constructed; and that each bond secured by

"such deed of trust shall bear an endorsement by such trustee stating "that such bond is one of the bonds secured by said deed of trust, "said deed of trust to be executed by the President and Treasurer "on behalf of the Company."

And Whereas the Directors of said company at a duly called meeting held in said Honolulu on the 11th day of March A. D. 1902 in pursuance of said authority granted by said stockholders and
21 of all other authority in them vested did authorize the issue of fifty bonds of the following form:

No. —. $1,000.00.

The Pacific Heights Electric Railway Company, Limited.

First Mortgage Six Per Cent. Twenty Year Gold Bond.

Know all men by these presents, that The Pacific Heights Electric Railway Company, Limited, a corporation, hereinafter called the "Railway Company," for value received, promises to pay to William O. Smith, as Trustee,, or to the bearer, One Thousand Dollars ($1,000.00) in gold coin of the United States of America on the first day of April, in the year A. D. 1922, at the office of the said Trustee, in Honolulu, Island of Oahu, Territory of Hawaii; and to pay interest thereon at the office of said Company, in like gold coin, at the rate of six per cent. (6%) per annum, from the date hereof until paid, semi-annually on the first day of October and the first day of April in each year, but only upon presentation and surrender, as they shall severally mature, of the coupons annexed hereto; said United States gold coin in every case to be of the standard weight and fineness as it existed on the first day of April, A. D. 1902.

This bond is one of a series of six per cent. gold first mortgage bonds of The Pacific Heights Electric Railway Company, Limited, issued and to be issued for an aggregate principal sum of fifty thousand dollars ($50,000.00) under and in pursuance of, and all equally secured by, a mortgage, or deed of trust, dated the first day of April, A. D. 1902, executed by the Railway Company to William O. Smith, as Trustee, on all of the property of the Railway Com-
22 pany mentioned in said mortgage or deed of trust, to which reference is hereby made for a statement of the property mortgaged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured and are to be used.

It is understood and agreed between the said The Pacific Heights Electric Railway Company, Limited, and the holder of this bond, that it may be paid on the first day of April, A. D. 1912, or at any interest-paying period thereafter. The bonds so to be paid (provided the whole issue shall not be paid at any one time) shall be determined by lot, to be drawn in the months of January or July, in the manner provided in said mortgage or deed of trust. The numbers of the bonds so drawn shall forthwith after such drawing be advertised for not less than one week in some newspaper of general

circulation published in said Honolulu, and such bonds so drawn shall cease to bear interest on the first day of April, or the first day of October, next after such drawing.

In Witness Whereof, the said The Pacific Heights Electric Railway Company, Limited, has caused its corporate seal to be hereto affixed and these presents to be signed in its name and behalf by its President and Treasurer, in Honolulu, on the first day of April, A. D. 1902.

THE PACIFIC HEIGHTS ELECTRIC
RAILWAY COMPANY, LIMITED,

By its President, —— ——
By its Treasurer, —— ——

23 *Form of Coupon.*

$30.00.

The Pacific Heights Electric Railway Company, Limited, an Hawaiian Corporation, on the — day of —— will pay to the bearer at the office of said Company in Honolulu, Island of Oahu, Territory of Hawaii, Thirty Dollars ($30.00) in United States gold coin, or its equivalent, being six months' interest on Bond No. —.

—— ——, *Treasurer.*

Form of Endorsement on Bond.

The Pacific Heights Electric Railway Company, Limited
First Mortgage Six Per Cent. Twenty-Year
Gold Bond
For
$1,000.00
Due April 1st, 1922.
Interest Payable
October 1st and April 1st.

I hereby certify that this Bond is one of the Series referred to within, and is entitled to the benefit of the Trust Deed to me dated April first, A. D. 1902, recorded in the Registry of Deeds, Territory of Hawaii.

—— ——, *Trustee.*

24 And whereas said Directors at said meeting in pursuance of all the authority above mentioned did authorize the execution and delivery in the name of and on behalf of said company by the President and Treasurer of said company of this deed of trust in the form in which the same is written;

And whereas said William O. Smith has accepted said trust;

Now therefore this indenture witnesseth:

That in order to secure the payment of the principal and interest of all such bonds as at any time may be issued and secured by this indenture, according to their tenor and effect, the said company,

party of the first part, in consideration of the premises and of the purchase and acceptance of said bonds by the holders thereof, and of the sum of one dollar to it paid by said trustee at or before the delivery of these presents, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, convey, assign and deliver unto said party of the second part, as such trustee, his heirs, successors and assigns forever all and singular the Pacific Heights Electric Railway, a railway beginning at the junction of Kaiulani Drive, a private way, and Booth road at Pauoa, Honolulu, Oahu and running up and along said Kaiulani Drive two and one-half miles more or less, following the windings of said road, to the summit station of said railway; and also all rights of way, sidings, stations, track, poles, wires, hangers, appurtenances, power house, steam plant, power generator, spare armature, light generator, two passenger cars, two freight cars, two passenger cars in the course of construction, one express car in the course of construction, all station buildings, car sheds and other structures and all tools, machinery, extra parts, rails, fish plates, stock on hand, blacksmith shop, chattels and supplies of every kind belonging to or
25 appurtenant to said railway; and also all of the tracts of land and all other property conveyed to said party of the first part by deed of Charles S. Desky, dated January 25, 1902, of record in the Hawaiian Registry of Deeds in Liber — folio —; and also all other property hereafter to be acquired by the party of the first part for the use of said railway as now constructed, and all franchises of the party of the first part.

To have and to hold said premises and property, and the appurtenances, conveyed by this deed of trust or intended so to be, to said party of the second part, trustee, his heirs, successors and assigns, forever.

But in trust nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds to be issued as voted by the stockholders of said company and intended to be secured by this indenture, and for the enforcement of the terms of said bonds when payable and the performance of and compliance with the covenants and conditions of this indenture,
26 without preference or priority of one bond over another by reason of priority of issue or negotiation thereof, so that every bond issued and to be issued as aforesaid and certified by said trustee as secured by this deed of trust shall have the same right, lien, and privilege under this indenture.

All of the bonds hereby secured being executed by the president and treasurer of said company in the name of said company shall be certified by said trustee as secured by this indenture.

The aggregate amount of said bonds for which this indenture shall be security shall be the sum of fifty thousand dollars and said bonds shall all bear date the 1st day of April — A. D. 1902, and interest upon the same at the rate of six per cent. per annum shall be payable semi-annually in equal payments on the 1st days of October and April in each year, according to the coupons made a part of said

bonds, both principal and interest of said bonds to be payable in United States gold coin.

In case any of said bonds shall be destroyed, lost or mutilated said company may in its discretion issue new bonds of like tenor and date to take the place of such lost, destroyed or mutilated bonds upon the receipt of satisfactory indemnity and security against loss in case any bond alleged to have been lost shall be presented for payment.

Said company shall have the right to redeem any or all of said bonds at any time after the expiration of ten years from the
27 date of these presents. The bonds to be redeemed in case the whole of said issue is not redeemed at one time are to be ascertained by lot.

Said company for itself, its successors and assigns, hereby covenants as follows: That it will duly pay to every holder of any bond issued as aforesaid and secured hereby the principal and interest accruing thereon as the same becomes due and payable, at the dates and places, and in the manner mentioned in said bonds or in the coupons thereunto attached, and also that it, said company, will pay and discharge all taxes and assessments which may be assessed upon and against the tangible property of said company, without deducting the same from said bonds or interest, and also that in case of neglect or refusal on the part of said company to pay such taxes said trustee may at his option pay the same and the amount so paid, together with interest thereon at the rate of six per cent. per annum shall thereupon become an additional indebtedness on this company secured by this indenture and shall be paid by said trustee from the funds, receipts or proceeds from the property conveyed by this indenture, if not otherwise paid by the said company, and also that said property is free and clear of all other incumbrances.

28 And also that said company will warrant and forever defend said property conveyed by this indenture, to said trustee, his heirs, successors and assigns, against the claims and demands of all persons lawfully claiming the same, or any part thereof.

And upon the further trust, that until default shall have been made in the due and punctual payment of the interest or principal of any of the bonds hereby secured or in the due performance and observance of any of the covenants and conditions of the part of said company herein contained to be kept and performed by said company, that said company, its successors and assigns, shall be suffered and permitted to retain actual possession of the railway and premises conveyed by this indenture, and to manage, control, operate and use the same, and every part thereof, and to collect and use all tolls, earnings, income and profit to be derived therefrom.

And also that said company shall have full power in its discretion from time to time to sell and dispose of free from the lien of this indenture, any portion of the machinery or equipment of said railway which may in the opinion of the directors of said company become unfit for use upon said road, replacing the same with new stock which shall thereupon become subject to the lien of this indenture.

Provided, however, upon the payment of the bonds secured or intended to be secured by this indenture, together with in-
29 terest thereon as above stated and of all other payments which may become due under and by virtue of the terms of this indenture, this indenture shall thereupon become void, and said trustee at the request of said company shall execute and place upon record an acknowlegdment of satisfaction of the amounts secured by this indenture.

In case default shall be made by said company

(1) In the payment of interest upon any bond or bonds secured by this indenture and such default shall have been continued for a period of thirty days, or in case,

(2) Default shall be made in the payment of the principal of any of said bonds or bond when the same becomes due, or in case,

(3) Default shall be made in the due observance or performance of any covenant herein contained on the part of said company, and such default shall have continued for a period of thirty days after written notice thereof to said company from said trustee or from the holders of five per cent. in amount of the bonds secured hereby;

Then, and in each and every such case said trustee may enter upon and take possession of said railway and of the rolling stock and other property conveyed by this indenture or intended so to be, and may exclude said company, its agents and servants wholly therefrom, and may use, manage, operate and control said railway and all property pertaining to the same or conveyed by this indenture in such
30 manner and for such length of time as to said trustee shall seem best, and may from time to time at the expense of the trust estate maintain and restore the rolling stock, tools, machinery, buildings, bridges, tracks and other property of said company in such manner as to said trustee shall seem expedient and may make all other necessary or proper outlays in connection with the operation of said railway and may exercise all powers which said company has as a corporation or otherwise, and in his discretion said trustee may upon the request of the holders of a majority in amount of the bonds secured by this indenture and upon notice in writing to said company declare the principal of all of said bonds at once due and payable and may thereupon sell to the highest bidder all and singular the said railway, chattels, property and effects conveyed by this indenture or intended so to be, after having advertised by public notice published in two newspapers published in said Honolulu a notice of the time and place of the proposed sale, such notice to be published for the period required by law in the case of mortgage foreclosures, and may from time to time postpone any sale advertised as aforesaid, and with or without further notice make the sale at such time and place as to said trustee may seem best, and may upon the completion of any such sale execute and deliver to the purchaser or purchasers of said property or of any portion of the same good and sufficient conveyances which conveyances shall forever bar and foreclose any equity of redemption existing in favor of said
31 company.

Any sale made under and by virtue of this indentture

whether under the power of sale hereinbefore granted or under and by virtue of judicial proceedings shall operate to divest all right, title, interest and estate, either at law or in equity, of said company in and to the property sold.

The receipt of the said trustee for the purchase money shall be a sufficient discharge to the purchaser of said property or of any part thereof sold as aforesaid, and no such purchaser, or his representative or grantee after paying such purchase money to said trustee and receiving such receipt shall be bound to see to the application of such purchase money or any portion of the same, nor shall be in any manner answerable for any loss, mis-application or non application of such purchase money or any part thereof, nor be bound to inquire as to the authorization, necessity or legality of any such sale. In case of such sale, whether under the powers contained in this indenture or pursuant to judicial proceedings, the principal sum of all the bonds secured by this indenture, if not previously due shall thereupon at once become wholly due and payable, anything in said bonds to the contrary notwithstanding. The purchase money and all other receipts from and earnings of said road or otherwise shall be applied by such trustee as follows:

First: To the payment of all costs and expenses of sale, including reasonable compensation to the trustee and to his attorneys
32 and counsel;

Second: To the payment of all advances made or liabilities incurred by the trustee in the management and maintenance of said railway prior to the date of the delivery of possession to the purchaser, and to the payment of all taxes, assessments or liens prior to the lien of these presents,

Third: To the payment of all interest due upon said bonds or any of them to the date of sale.

Fourth: To the payment of the principal of said bonds without preference or priority of one bond over another, and if said proceeds shall be insufficient to pay said bonds in full then to apply such proceeds pro rata towards the payment of said bonds,

Fifth: To pay the surplus, if any, to said company, its successors or assigns,

Until default on the part of said company said trustee shall be paid the sum of One Hundred dollars annually in full for his services.

No owner of any bond or coupon hereby secured shall have the right to institute any suit or proceeding at law or in equity for the foreclosure of this indenture of for the execution of any trust herein contained, or for the appointment of a receiver or for any other remedy, unless such holder shall have previously given to said trustee written notice of the default claimed and of the continuance thereof as hereinafter provided, and shall have made written request
33 upon said trustee and shall have given reasonable opportunity to said trustee to exercise the powers hereinbefore granted or to innitiate such action or proceedings in his own name; nor unless he shall have offered to said trustee adequate security against costs, charges and liabilities to be incurred thereby, and provided further that the default relied upon shall have existed and continued

for the period of thirty days prior to the date of such notice to said trustee. The notices, requests and offers of indemnity herein provided for shall at the option of the trustee be conditions precedent to the execution of the powers and trusts named in this indenture and to any action or cause of action for foreclosure, or for the appointment of a receiver, or for any other remedy; it being understood and intended that no one or more holders of bonds or coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action or to enforce any right hereunder except in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

Said trustee or his successors may resign by giving notice thereof to said company in writing thirty days before the date said resignation shall go into effect and by publishing a notice to the holders of said bonds in some newspaper published in said Honolulu at least one issue for two weeks.

Said trustee may be removed at any time by an instrument
34 in writing under the hands of three fourths in amount of the holders of the bonds hereby secured and then outstanding.

In case of the resignation of said trustee or his inability to act or his removal in any manner a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding by an instrument or instruments signed by such bond holders, provided, nevertheless, that in case there shall be a vacancy at any time in the office of trustee hereunder said company by an instrument in writing, signed by its president and treasurer may appoint a new trustee to fill such vacancy until the bondholders shall have acted as hereinbefore provided.

Every new trustee when appointed shall execute and deliver to said company an instrument in writing accepting such appointment, and thereupon such new trustee or trustees without any further act, deed or conveyance shall become vested with all the assets, properties, rights, powers, trusts, duties and obligations of his or their predecessor in said trust herein, with like effect as if originally named as trustee herein, but the trustee ceasing to act shall nevertheless upon the written request of such new trustee execute and deliver an instrument transferring to such new trustee upon the trusts herein expressed all of the assets, properties, rights, powers and trusts of the trustee ceasing to act as aforesaid and shall duly assign, transfer and deliver
any property and money held by him under the terms of this
35 deed of trust to the new trustee or trustees acting in his place.

This indenture shall be obligatory upon said company, the party of the first part, and upon its successors and assigns in all cases whether herein above so expressed or not.

Except when otherwise expressly stated herein the words "said trustee" as used in this indenture shall be held and construed to mean the trustee or trustees for the time being, whether original or successors, and the words "trustee," "bond," "bond holder," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify majority in amount.

And the said William O. Smith party of the second part, hereby accepts the trusts in this indenture declared and provided and agrees to perform the same upon the terms and conditions hereinabove set forth.

Liability of Trustee.—No default or misconduct of an agent or attorney of the Trustee, appointed by him pursuant hereto, shall charge the Trustee or make him answerable for such default or misconduct; provided, however, that said Trustee shall have exercised reasonable care in the selection of such agent or attorney. The Trustee shall not be answerable or liable hereunder for anything whatever arising from or in connection with the trust hereby created, except his wilful misconduct or gross negligence, nor shall the Trustee be liable personally for any obligations contracted by him,
or for damages to persons or property carried or injuried, or
36 for salaries or for nonfulfillment of contracts, during any
period wherein the management of the trust property herein or premises upon entry or the voluntary surrender, as aforesaid, shall devolve upon the Trustee; nor shall the Trustee be obliged to initiate action to enforce the execution of the trusts hereby created, which, in his judgment, may subject him to expense or liability, unless one or more of the holders of the bonds hereby secured shall, upon the request of the Trustee, furnish him with such indemnity or security as may be reasonable and, in his discretion, sufficient to save him harmless against such expense or liability; nor shall the Trustee be required to take notice of any default hereunder unless notified in writing of such default by the holders of at least five per cent. in amount of the bonds hereby secured, then outstanding, and tendered reasonable indemnity as aforesaid, anything contained to the contrary notwithstanding, no such notice or request shall affect any discretion herein given to the Trustee to determine whether or not he shall take action in respect of such default or to take action without such request.

The Trustee shall be entitled to reasonable compensation for all services rendered by him in the execution of the trusts hereby created.

In witness whereof said party of the first part has caused its corporate name and seal to be hereunto affixed by Charles S. Desky, its President and J. G. Pratt, its Treasurer, and said party of the second part has hereunto set his hand and seal the day and year first above written.

THE PACIFIC HEIGHTS ELECTRIC
RAILWAY COMPANY, L'T'D,
By Its President, CHARLES S. DESKY.
By Its Treasurer, JOSEPH G. PRATT.
WILLIAM O. SMITH. [SEAL.]

37 TERRITORY OF HAWAII, *Island of Oahu*, ss:

On this seventh day of April A. D. 1902 personally appeared before me Charles S. Desky, President and Joseph G. Pratt, Treasurer of The Pacific Heights Electric Railway Company, Limited,

a corporation, known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily and as and for the free act and deed of said The Pacific Heights Electric Railway Company, Limited, for the uses and purposes therein set forth.

BENJ. L. MARX,
Notary Public, First Judicial [SEAL.]
Circuit, Territory of Hawaii.

I hereby certify that the words "and said party of the second part has hereunto set his hand and seal" were inserted in the 25th line of the 19th page of the foregoing instrument before execution thereof.

B. L. MARX,
Notary Public, First Judicial Circuit.

Honolulu, April 7, 1902.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

On this 7th day of April A. D. 1902 personally appeared before me William O. Smith known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein set forth.

BENJ. L. MARX,
Notary Public, First Judicial Circuit.

38 EXHIBIT B.

J. A. T., Clerk.

An Indenture made this twenty-fifth day of January, A. D. 1902 by and between Charles S. Desky, party of the first part, and The Pacific Heights Electric Railway Company, Limited, a corporation established and existing under and by virtue of the laws of the Territory of Hawaii, party of the second part;

Whereas the party of the first part, being the owner of the Pacific Heights Electric Railway, has together with his associates formed a corporation under the name of The Pacific Heights Electric Railway Company, Limited, for the purpose of taking over said railway together with all equipment and appurtenances, and has agreed to sell said railway to said company, in consideration of the issue and delivery to him of seven hundred and fifty paid up shares of the capital stock of said company and fifty bonds of said company of the par value of one thousand dollars each, to be secured by a deed of trust upon the property of said company;

Now Therefore this Indenture Witnesseth that said party of the first part in pursuance of said agreement and in consideration of the issue and delivery to him by said party of the second part seven

hundred and fifty paid up shares of the Capital stock of said party of the second part and of fifty bonds of said party of the second part for one thousand dollars each, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold and conveyed, and by these presents does give, grant, bargain, sell and convey all of the Pacific Heights Electric Railway, a railway beginning at the junction of Kaiulani Drive and Booth road at Pauoa, Honolulu
39 Oahu, and running up and along said Kaiulani Drive, the same being a private way constructed by the party of the first part on his land, following the windings of said road as said railway is now built, two and one half miles more or less to the summit station of said railway; and also the right to construct such additional sidings and stations as may be desired at any points and also a right of way for said road as the same is now constructed, together with all walls, culverts and other structures appurtenant to the same; and also all track, poles, wires, hangers and appurtenances; and also the power house, steam plant, power generator, spare armature, light generator, two passenger cars, two freight cars, two passenger cars in the course of construction, one express car in the course of construction, all station buildings and car sheds and all tools, machinery, extra parts, rails, fish plates, stock on hand, brakes, shop chattels and supplies belonging to or appurtenant to said railway;

And also all of those tracts of land situated at Pauoa, Honolulu, Island of Oahu, Territory of Hawaii, bounded and described as follows:

(1.) Description of a portion of Land Commission Award No. 10605, Royal Patent 2672, Apana 7, to Kamakee Piikoi, on which is located the power station of the Pacific Heights Electric Railway, Honolulu, District of Kona, Island of Oahu:

Beginning at an iron spike driven in a rock ledge on the Makai boundary line of L. C. A. 10605, S. 12° 30′ West 6-8/10 feet distant from the souther-most corner of the said power house, said point bearing from Punchbowl Triangulation Signal Station N. 2° 34′ 30″ E. 3058 feet distant, and running thence by true meridian as follows:

1. N. 77° 30′ E. 44.7 feet,
40 2. N. 44° 42′ E. 71.9 feet along Kaiulani Drive,
3. N. 14° 58′ W. 26.3 feet to a point 6 feet beyond the center of the Electric Railway track, thence along a line parelleling said track and 6 feet distant from said center, direct bearing and distance being
4. S. 78° 12′ W. 103.8 feet, thence,
5. S. 12° 30′ E. along line of L. C. A. 10605 to the initial point, containing an area of 5179 feet.

(2.) Description of a portion of L. C. A. No. 273, R. P. No. 302 to J. Booth, being that portion on which is located the mauka terminal station of the Pacific Heights Electric Railway, Honolulu, District of Kona, Island of Oahu,

Beginning at a wooden stake driven at the edge of the bank near most southerly corner of the said Station shed, said point being 16.8 feet from the center of the Electric Railway track at right angles thereto, and said point bears from the Reservoir Survey Station N.

30° 05′ E. true, 1055 feet distant. Running thence by true meridian as follows:

1. N. 18° 38′ E. 39.8 feet,
2. N. 71° 22′ W. 37.6 feet,
3. S. 18° 18′ W. 39.8 feet,
4. S. 71° 22′ E. 37.6 feet to the initial point.

Containing an area of 1496 feet.

To have and to hold together with all buildings, improvements, rights, privileges, easements and appurtenances to the same belonging or appertaining or held and enjoyed therewith, unto said party of the second part, its successors and assigns, to its and their
41 own use and behoof forever.

And the said party of the first part for himself and his heirs, executors and administrators, hereby covenants and agrees to and with the said party of the second part, its successors and assi*gns*, that he, the party of the first part, is seized and possessed of said premises in his own right of an estate in fee simple and hass full power and lawful authority to sell and convey the same; that said premises are free and clear of all encumbrances except a mortgage on said land to Charles W. Booth, dated September 24, 1900, on record in the Hawaiian Registry of Deeds in Liber 214 on pages 218-224, which said mortgage is hereby assumed by said party of the first part; and against any claim under which said party of the first part, for himself, his heirs, executors and administrators, hereby covenants to protect and indemnify said party of the second part, its successors and assigns; and said party of the first part for himself, his heirs, executors and administrators, will and shall warrant and defend said premises unto said party of the second part, its successors and assigns against the lawful claims and demands of all persons.

And Minnie Desky, wife of said party of the first part, in consideration of one dollor to her paid by said party of the second part, the receipt whereof is acknowledged, hereby release- and quit-claims to said party of the second part, its successors and assigns, all of her right or possibility of dower in and to said granted premises.

In witness whereof said party of the first part and Minnie Desky his wife have hereunto set their hands and seals the day and year first above written.

[SEAL.] CHAS. S. DESKY,
[SEAL.] MINNIE DESKY,
By Her Att'y in Part, Chas. Bon.

Acknowledged before
B. L. MARX,
Notary Public.

Jan. 25, 1902.

[Endorsed:] Filed Sept. 10, 1904 at 10.40 A. M. (Sg.) J. A. Thompson, Clerk.

42 Copy.

In the Circuit Court of the First Circuit, Territory of Hawaii. At Chambers.

Stamps, $2.00.

WILLIAM O. SMITH, Trustee,
vs.
THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, a Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, a Corporation; SISTER ALBERTINA (also Known as Ellen Polyblank), as Trustee for Stella K. Cockett, and CHARLES S. DESKY.

Chambers Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii or his Deputy, the Sheriff of the Island of Oahu or his Deputy:

You are commanded to summon The Pacific Heights Electric Railway Company, Limited, a Corporation, August Dreier, Honolulu Rapid Transit and Land Company, Limited, a Corporation, Sister Albertina (also known as Ellen Polyblank) as Trustee for Stella K. Cockett, and Charles S. Desky, to appear ten days after service hereof, if they reside on the Island of Oahu, otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court Room at Honolulu, Island of Oahu, in said Territory, to answer the annexed Petition of William O. Smith, Trustee.

And you are further commanded, by order of Hon. —— —— Judge of the Circuit Court of the — Circuit ——. And have you then there this Writ with full return of your proceedings thereon.

Witness the First Judge of the Circuit Court of the First Circuit at said Honolulu this 10th day of September, 1904.

[SEAL.] (Signed) J. A. THOMPSON, *Clerk.*

§ 1278, Civil Laws. The time within which an act is to be don [mutilated] * [mutilated] shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be ex [mutilated].

I certify the within Summons and Bill of Foreclosure hereto annexed to be true copies of the original, on file in said Court.

A. M. BROWN,
High Sheriff.

[Endorsed:] Copy E. 1429. Circuit Court First Circuit William O. Smith, Trustee *v.* The Pacific Heights Electric Railway Co.

Ltd. *et al.* Chambers summons Issued at 10.41 A. M., September 10, 1904 (Sg.) J. A. Thompson Clerk. Returned at 1 o'clock P. M., Sept. 13, 1904 (Sg.) J. A. Thompson Clerk.

— Service @ $1.00 each ..... $
— Cop @ $1.50 each ..... $
Expense .....

Total ..... $

Louis J. Warren—Attorney for Peti [mutilated] Bldg

Served this Summons as follows:
On Pacific Heights Electric Railway Co. Ltd., a corporation, through J. G. Pratt, its Treasurer, on Honolulu Rapid Transit and Land Co. a corporation through C. H. Atherton, its Treasurer, on Sister Albertina (also known as Ellen Polyblank) as trustee for Stella K. *Corkers*, and on Charles S. Desky, all of Honolulu, Oahu, at Honolulu, Oahu, this 12th day of September A. D. 1904 By delivering to each of them a certified copy hereof, and of the Petition hereto annexed, and at the same time showing each of them the original as directed
Dated Sept. 12 1904
(Sg.) ALBERT L. McGUM,
Deputy Sheriff.

Service is hereby accepted by F. A. Scheafer & Co. as agents of A. Drier. Honolulu Sept. 12 A. D. 1904
(Sg.) H. FOSTER,
Of F. A. Scheafer & Co.

43 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, At Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Hololulu in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (also Known as ELLEN POLYBLANK), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents.

Bill for Foreclosure of Trust Deed.

Separate Answer of the Honolulu Rapid Transit and Land Company to the Bill of Complaint.

This Respondent, the Honolulu Rapid Transit and Land Company, now and at all times hereafter saving to itself all and all manner of benefit or exception, or otherwise, that can or may be had or

taken to the many errors, uncertainties and imperfections in the said Bill contained and not waiving its demurrer hereby filed for answer thereto or to so much thereof as this Respondent is advised is material or necessary for it to make —, answering says:

44 That it admits Paragraph One in the Complaint, excepting that it does not admit that this Respondent is a corporation under the name of the Honolulu Rapid Transit & Land Company, Limited, but admits that it is a corporation under the name of the Honolulu Rapid Transit & Land Company;

That it admits the execution of the Deed of Trust set forth in Paragraph Two of said Bill;

That it admits Paragraphs Three, Four and Five of said Bill, but not having sufficient information and belief to affirm or deny, it does not admit Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of said Bill, but leaves the said Plaintiff to his proof of the same;

That it is advised that it is unnecessary to answer said Paragraph Twelve;

That it admits as much of Paragraph Thirteen as it is alleged that the said Respondent Charles S. Desky did make, execute and deliver to this Respondent an instrument in writing, purporting to be a Bill of Sale and conveyance to this Respondent of the cable alleged in said Paragraph, but denies that the same was made on the 24th day of June, 1904; it alleges that the same was made on or about the 8th day of August, 1903; that the cable was then of the value not to exceed Seven Hundred Dollars; denies that the same was then and there the property of the Pacific Heights Electric Railway Company, Limited; that the same was a part of the property included in said Trust Deed to the Petitioner or subject to said first lien and charge of said first Trust Deed; and admits that said cable, then in the use and possession of this Respondent by agreement with the Pacific Heights Electric Railway Company, Limited and the said Respondent, Charles S. Desky; admits that it is the cable re-

45 ferred to in said Paragraph, excepting that it does not run to the lower terminus of the said railway of the Pacific Heights Electric Railway Company, Limited but to the piece of railroad hereinafter referred to, which piece is the property of this Respondent and constitutes a connection between the railroad of this Respondent and said Pacific Heights Electric Railway Company, Limited; and

This Respondent further alleges that said cable was never used by or was appurtenant to or a part of the system of the said Pacific Heights Electric Railway Company, Limited and at the time of said sale and for long before it had not been used as a part of said system and that it was not appurtenant thereto or purposed to be used and alleges that said sale by said Desky and said Pacific Heights Electric Railway Company, Limited passed the title to this Respondent, free from any claim of the Petitioner herein.

This Respondent further denies that said cable was conveyed to said Pacific Heights Electric Railway Company, Limited by the deed alleged in said paragraph, and alleges that if the lien of said Trust Deed ever did attach to said cable it was divested by said sale.

This Respondent further denies that the Pacific Heights Electric

Railway Company, Limited is or ever was the owner of the certain rails wires and overhead wire and cable and wire hangers now laid and installed upon and constituting the track and overhead wire and hangers now upon and along a certain strip of land described in the deed from the Hawaiian Government to Charles S. Desky, dated the 18th day of August, 1902, recorded in the Registry Office, Liber 245, pages 328 *et seq.*; and denies that said track was
46 an adjunct to said Railway Company's railway; denies that it was a part of the property included in and conveyed by said Trust Deed; denies that the said property has been incorporated and used in the construction of said track without the knowledge or consent of said Trustee; and denies that the same are subject or ever were subject to the lien and charge of said Deed of Trust; and

This Respondent alleges that it is the owner of said rails wires, wire cable, hangers and of said railway by virtue of a certain conveyance from the Hawaiian Tramways Company, Limited, a corporation, to the Honolulu Rapid Transit & Land Company, by deed dated July 28, 1903, recorded in said Registry Office, Liber 250, pages 323 to 329, to which reference is made, the said Hawaiian Tramways Company being, at the time of the execution of said deed, the owner of said railway and appurtenances.

This Respondent is advised that it is unnecessary to answer Paragraph Fourteen of said Bill

Wherefore, your Respondent prays that it may be decreed by this Court that it is the owner of said cable herein mentioned and described, and described in said Bill of Complaint, and is the owner of the property described in Paragraph Fourteen of said Bill of Complaint, to-wit, said railway from Nuuanu Street to the line of said Pacific Heights Electric Railway Company, Limited and that said cable and said railway are not subject to the lien of said Trust Deed, but are the property of this Respondent and that this Respondent be hence dismissed upon said decree, with its reasonable costs and charges in its behalf most wrongfully sustained.

HONOLULU RAPID TRANSIT
& LAND CO.,

(Sg.) By C. G. BALLENTYNE,
Its General Manager.

(Sg.) CASTLE & WITHINGTON, *Of Counsel.*

47 TERRITORY OF HAWAII, *First Circuit:*

C. G. Ballentyne, being duly sworn, deposes and says that he is the General Manager of the Honolulu Rapid Transit and Land Company, Respondent herein, and that he has read the foregoing petition by it signed and knows the contents thereof and that the same are true, excepting as to such matters alleged therein on information and belief, and as to them he believes them to be true.

(Sg.) C. G. BALLENTYNE.

Subscribed and sworn to before me this 26 day of Sept., 1904.

[SEAL.] (Sg.) S. DE FREEST,
Notary Public, First Circuit.

48 [Endorsed:] No. —. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. William O. Smith, Trustee Petitioner, *vs.* Pacific Heights Electric Railway Company, L't'd. *et als.*, Respondents. Separate answer of the Honolulu Rapid Transit & Land Company. Filed Sept. 26, 1904. (Sg.) George Lucas, Clerk. Castle & Withington Attorneys for H. R. T. & L. Co.

49 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Honolulu in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (also Known as ELLEN POLYBLANK), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents.

Bill for Foreclosure of Trust Deed.

Decree.

The petition of William O. Smith, as Trustee under Deed of Trust recorded in the Registry Office in Honolulu, in Liber 237 on pages 29 to 39, Petitioner above named, for the foreclosure of a certain mortgage or trust deed hereinafter mentioned, and for the sale of the property in and by said mortgage or trust deed described and referred to for the satisfaction of the debt thereby secured, having come on regularly for hearing on the 24th day of October 1904, before the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Circuit above named, sitting at Chambers, in Equity, Messrs. Smith & Lewis and Louis J. Warren appearing as counsel for said petitioner, and Messrs. Castle & Withington appearing for the respondent the Honolulu Rapid Transit and Land Company,

50 William S. Fleming Esquire appearing for the respondent Sister Albertina, (also known as Ellen Polyblank) as Trustee for Stella K. Cockett, and the respondent The Pacific Heights Electric Railway Company, Limited, appearing by Joseph G. Pratt, its Secretary and Treasurer, and Charles S. Desky its President, and the respondent Charles S. Desky appearing for himself personally, and the respondent August Dreier not appearing at said hearing, but having theretofore filed his answer by his attorneys Messrs. Holmes & Stanley, wherein said last named respondent did consent to the making and entry of a Decree in said cause as prayed by the petitioner, but asking that certain property in said answer referred to be sold last;

And this Court having on the 21st day of November 1904, rendered and filed its decision in said cause upon the evidence adduced at said hearing, the admissions of the parties in open court and in their

respective pleadings, and upon written argument submitted to said Court by the respective parties;

And it now appearing to this Court that on the first day of April A. D. 1902, the said respondent, The Pacific Heights Electric Railway Company, Limited, did duly execute and deliver to said petitioner, the said William O. Smith, a certain Deed of Trust or Mortgage, dated on said day and which was on the 25th day of April 1902, duly filed for record and recorded in the Office of the Registrar of Conveyances in said Honolulu in Liber 237 on pages 29 to 39, wherein and whereby the said The Pacific Heights Electric Railway Company, Limited, did convey to said petitioner, as trustee, upon the terms in said Deed of Trust set forth, hereinafter particularly mentioned, certain real property and estate, and all and singular the railway system, equipment, and appurtenances, then known as the Pacific Heights Railway, a railway beginning at the junction
51 of Kaiulani Drive, a private way, and Booth Road, at Pauoa, said Honolulu, and running up and along said Kaiulani Drive two and one-half miles, more or less, following the windings of said road, to the summit station of said railway, together also, with all appurtenances thereto belonging, hereinafter particularly mentioned and referred to; and also all other property to be acquired by said The Pacific Heights Railway Company, Limited, after the making of said Deed of Trust, for the use of said railway as then constructed; and also all franchises of said The Pacific Heights Railway Company, Limited; the said Deed of Trust having so conveyed all and singular the said property and interests unto said petitioner, he to have and hold the same in trust for the equal and proportionate benefit and security of the holders of all the bonds then intended to be issued by said The Pacific Heights Railway Company, Limited, upon the vote of the stockholders thereof and intended to be secured by said Deed of Trust, to the amount in aggregate of $50,000., that is to say: bonds of the denomination of $1,000. each, aggregating $50,000., and the interest thereon, the said bonds to bear date the 1st day of April 1902, and to bear interest at the rate of 6% per annum, payable in equal installments on the first days of October and April in each year, according to the interest coupons attached to and made part of said bonds, principal and interest to be payable in United States gold coin; the said trustee further holding said property so conveyed in trust for the enforcement of the terms of said bonds when payable and the performance of and compliance with the covenants and conditions of said deed of trust.

That in said Deed of Trust it is provided and declared that the said The Pacific Heights Electric Railway Company, Limited,
52 shall duly pay to every holder of any bond issued as aforesaid and secured by said deed, the principal and interest accruing thereon as the same become due and payable; and also that said The Pacific Heights Electric Railway Company, Limited, will pay and discharge all taxes and assessments which may be assessed upon and against the tangible property of said Company, without deducting the same from said bonds or interest.

That in said Deed of Trust it is further provided that in case default shall be made by said Company

(1) In the payment of interest upon any bond or bonds secured by this indenture and such default shall have been continued for a period of thirty days, or in case,

(2) Default shall be made in the payment of the principal of any of said bonds or bond when the same becomes due, or in case,

(3) Default shall be made in the due observance or performance of any covenant herein contained on the part of said company, and such default shall have continued for a period of thirty days after written notice thereof to said company from said trustee or from the holders of five per cent. in amount of the bonds secured hereby;

Then and in each and every such case said trustee may enter upon and take possession of said railway and of the rolling stock and other property conveyed by this indenture or intended so to be, and may exclude said company, its agents and servants wholly therefrom, and may use, manage, operate and control said railway and all property pertaining to the same conveyed by this indenture in such manner and for such length of time as to said trustee shall seem best, and may from time to time at the expense of the trust estate maintain and restore the rolling stock, tools, machinery, buildings,
53 bridges, tracks, and other property of said company in such manner as to said trustee shall seem expedient and may make all other necessary or proper outlays in connection with the operation of said railway and may exercise all powers which said company has as a corporation or otherwise, and in his discretion said trustee may upon the request of the holders of a majority in amount of the bonds secured by this indenture and upon notice in writing to said company declare the principal of all of said bonds at once due and payable and may thereupon sell to the highest bidder all and singular the said railway, chattels, property and effects conveyed by this indenture or intended so to be, upon notice thereof as in said Deed of Trust provided to be given; it being further therein provided that any sale made under and by virtue of said indenture whether under the power of sale therein granted or under and by virtue of judicial proceedings, shall operate to divest all right, title, interest and estate, either at law or in equity, of said company in and to the property sold.

That after the execution and delivery of said Trust Deed by said The Pacific Heights Electric Railway Company, Limited, to your said petitioner as trustee, as aforesaid, said The Pacific Heights Electric Railway Company, Limited, did, on the 1st day of April 1902, issue, negotiate and sell its certain bonds, being a series of 6% 20-year gold bonds, for $1000. each, to the aggregate amount of $50,000, the whole of which are now issued and outstanding and in the hands of *bona fide* holders, to-wit: Forty of said bonds are now owned by Cecil Brown, Trustee, of said Honolulu, and Ten of said bonds are now owned and held by F. M. Hatch, of Honolulu.

That said The Pacific Heights Electric Railway Company, Limited, has made default in the payment of the interest upon
54 said bonds, which did become due and payable at the times and in the sums following, to-wit:

On October 1, 1902, in the sum of $1200.,
On April 1, 1903, in the sum of $1200.,
On October 1, 1903, in the sum of $1200., and
On April 1, 1904, in the sum of $1200.,

Amounting in all as unpaid interest to the sum of $4800.

That said Company did fail and neglect to pay said interest on said bonds as demanded, as aforesaid, and still fails and neglects so to do.

That on the 2nd day of July 1904, said petitioner was informed by the said Cecil Brown and F. M. Hatch, bondholders as aforesaid, that default had been made by said The Pacific Heights Electric Railway Company, Limited, in the payment of the said interest due and accrued on said bonds, demand having been made by said bondholders upon said Company for payment of the same, and such payment refused; and said bondholders did then, on said 2nd day of July 1904, request said petitioner as Trustee under said Deed of Trust, to forthwith take possession of the property and premises in and by said Trust Deed described and conveyed, pursuant to said Deed of Trust.

That on said 2nd day of July 1904, and immediately upon receipt by said petitioner of the said notice and request to said petitioner given and made by said bondholders, said petitioner did give notice to said The Pacific Heights Electric Railway Company, Limited, that unless all interest then due upon said bonds be forthwith paid, said petitioner would proceed to take possession of the said property and premises in accordance with the provisions of said deed.

That the said The Pacific Heights Electric Railway Company, Limited, did then, on said 2nd day of July 1904, inform
55 said petitioner that it was unable to pay the said interest on said bonds.

That thereupon, on said last named day, said petitioner, as trustee under said trust deed, did enter into and upon and take over and into his possession and control, all and singular the property and premises in and by said trust deed described and referred to, save as to certain property hereinafter mentioned.

That at the time of taking possession of said property by said Trustee as aforesaid, including said railway, the same was in an unsafe and dangerous condition and could not have been continued in operation as a railway without great danger to the lives and limbs of persons riding thereon or operating the cars thereon and without great danger of loss and destruction of the railway property in that the said railway was and is greatly out of repair, and that the same could not have been placed in good condition or repair for the safe and efficient operation thereof without the expenditure of the sum of Five Thousand Five Hundred Dollars ($5500.) or thereabouts.

That at said time said respondent The Pacific Heights Electric Railway Company, Limited, was unable to make said repairs or operate said road;

That said Trustee was unable after reasonable endeavors to obtain

sufficient funds wherewith to make such repairs for the carrying on and operation of said railway, and that said Trustee did, on the 17th day of August 1904, at the request of the said bondholders, declare the principal of all of the said bonds at once due and payable, and did give written notice thereof to said respondent The Pacific Heights Electric Railway Company, Limited, with notice of the intention of said Trustee to proceed to sell the property in said deed described.

56 And further, that on or about the 30th day of January, 1904, and after the making of said Deed of Trust, said The Pacific Heights Electric Railway Company, Limited, by Charles S. Desky, its President and Joseph G. Pratt, its Treasurer, did make, execute and deliver to the respondent August Dreier, an instrument in writing wherein and whereby said corporation did sell and convey to said August Dreier, a certain *Steam Condenser* (pump), then in good order and condition, then situated, and being in the power house of said The Pacific Heights Electric Railway Company, Limited, and under said instrument did deliver the same to said August Dreier, which said article was then and there subject to the prior lien and charge of the said Trust Deed, the said sale having so been made without the knowledge or consent of said petitioner, as trustee or of said bondholders.

"That on or about the 27th day of June 1904, the said Charles S. Desky, without the knowledge or authority of said The Pacific Heights Electric Railway Company, Limited, or of its Directors, did attempt to sell and convey to said respondent Honolulu Rapid Transit and Land Company, a certain cable, to-wit: a 5593 foot—4021 lbs. 4/0 Triple Braid Weather Proof Cable in good order and condition, then belonging to and being the property of said Pacific Heights Electric Railway Company, Limited, and then and there being property theretofore conveyed by and included within the terms of said trust deed, and subject to the prior and first lien and charge of said deed, said cable being then in use and in the possession of said Honolulu Rapid Transit and Land Company by agreement with said Pacific Heights Company "and" said attempted sale of said cable having been so made by said Desky without the knowledge or consent of said trustee or of said bondholders, and that said attempted sale was and is void and conveyed no title to said cable to said Honolulu Rapid Transit and Land Company, said cable being hereinafter more particularly described and referred to.

57 And it further appearing to this Court that said Petitioner, as trustee, has no right, title or interest, under said trust deed or otherwise, in or to the branch or connecting railway in said Bill of Complaint referred to as the "adjunctive railway," running from Nuuanu Avenue to a point mauka or above the power house of said Pacific Heights Company and there intersecting said Pacific Heights Company's main line of railway, or in or to the rails, equipment and right of way for the same; and is not entitled to sell the same as a part of the security covered by said trust deed;

And further, that prior to the making of said deed of trust to said petitioner herein, said The Pacific Heights Electric Railway Company, Ltd., did make and execute a certain mortgage upon the

tracts of land in said trust deed described and referred to, to one Charles W. Booth, which said mortgage was released and discharged by said Charles W. Booth with respect to all the roadway and right of way for tracks and poles as held and occupied by the Pacific Heights Electric Railway Company, Ltd., at the time of such release, to-wit: on December 3rd, 1902, and which said mortgage was, after said partial release and prior to the commencement of this suit, foreclosed by said Booth by decree of the Circuit Court, whereunder all the remaining property in said mortgage described, not specifically so released therefrom, was sold;

And it appearing that said petitioner, as such trustee, is entitled to a judgment and decree herein as now set forth:

Now therefore, it is ordered, adjudged and decreed:

That there is now due, owing and payable by said Respondent, The Pacific Heights Electric Railway Company, Limited, to the holders of the said bonds issued under and secured by the said trust deed, under the terms thereof, the principal sum of Fifty Thousand Dollars ($50,000.), together with the further sum of Five
58 Thousand Dollars ($5,000.) on account of interest on said principal sum of said bonds as therein provided, being interest from the date of issuance of said bonds, to-wit: April 1st, A. D. 1902, to October 1st, 1904, and that default has been made by said Respondent The Pacific Heights Electric Railway Company, Limited, in the payment thereof, as in said bonds provided, together also with the costs of this suit, which are hereby taxed at the sum of Thirty-eight Dollars ($38.00) and also the further sum of Five Hundred Dollars ($500.00) as an attorney's fee herein for said petitioner; amounting in all on account of said principal, interest, costs and attorneys' fee, to the sum of Fifty-five Thousand Five Hundred Thirty-eight Dollars ($55,538.00), for the full payment of which the said trust deed is hereby adjudged and decreed to constitute and be a valid and subsisting first lien and charge upon all and singular the property hereinafter described and directed to be sold under this decree;

And it is hereby further Ordered, Adjudged and Decreed that M. T. Simonton, Esq. be and he hereby is appointed Commissioner of this Court, and that as such Commissioner he be and he hereby is authorized, empowered and directed upon his filing a bond in the sum of One Thousand Dollars ($1000.00) to sell all and singular the property and interests hereinafter described and referred to, in manner and in the order as hereinafter provided, or so much thereof as shall be necessary to raise the whole amount due from said Respondent The Pacific Heights Electric Railway Company, Limited, on account of said principal of and interest upon said bonds (with further interest from the first day of October, 1904, to the date of such sale), and also said costs and attorneys' fee, and the expenses of such sale; such sale to be made at public auction in said Honolulu upon notice thereof to be published in some newspaper of general circulation printed and published in said Honolulu for not less than once a week for four consecutive weeks before said

sale, and by posting of notices thereof in said Honolulu, said
59 Commissioner to make due and full return of such sale to this Court for its approval and confirmation within ninety (90) days from the date of this decree;

That upon the making of such sale said Commissioner shall make, execute and deliver to the purchaser or purchasers of the property sold, upon receipt of the purchase money therefor, a deed or deeds or other sufficient instruments of conveyance and assignment thereof, and that such purchaser or purchasers be let into the immediate possession of the property to them sold upon production of such deed therefor, without further order of this Court for the surrender of the same to such purchasers;

That Trustee or said bondholders, or either of them, or any parties to this suit may become purchasers at such sale.

That said Commissioner shall apply the proceeds of such sale substantially in the manner in said trust deed provided, that is to say:

First: To the payment of all costs and expenses of such sale, and the costs of this suit; and also the sum of Two Hundred Dollars ($200.00) to said William O. Smith, Trustee, by way of compensation to him for his services in the matter of said trust and of making said sale, and also said sum of Five Hundred Dollars ($500.00) as an attorneys' fee, as aforesaid;

Second: To the payment of all advances made or Liabilities incurred by said Trustee in the care and preservation of said property at any time prior to the date of delivery of possession to the purchaser thereof, at such sale;

Third: To the payment of all interest due upon said bonds to the date of sale; and in case said proceeds shall be insufficient to pay said interest upon all of said bonds in full, then to apply the same pro rata on account of all of said bonds;

Fourth: To the payment of the principal of all of said bonds without preference or priority of one bond over another, and if said proceeds shall be insufficient to pay all of said bonds in full,
60 then to apply such proceeds pro rata on account of the principal of all of said bonds;

Fifth: To pay the surplus, if any, to said The Pacific Heights Electric Railway Company, Limited, its successors or assigns.

It is further Ordered, that in case the moneys arising from said sale shall be insufficient to pay in full the whole of said costs, principal, interest, and charges hereinabove provided to be paid therefrom, said Commissioner shall in his return and account of said sale, specify the amount of such deficiency and balance due and unpaid, and that upon the filing of such return of sale the Clerk of this Court shall, without further order of this court, docket a judgment in this action for such unpaid balance, against said Respondent The Pacific Heights Electric Railway Company, Limited, and in favor of said William O. Smith, Trustee, Petitioner herein; and that said Respondent The Pacific Heights Electric Railway Company, Limited, do pay to said Petitioner the amount of such balance and judgment so docketed, with interest thereon at the

rate of six per cent. per annum from the date of said return; and that said Petitioner may have execution issued therefor;

That said Respondents herein and any and all persons claiming or to claim by, through or under them or any of them, be forever barred and foreclosed of and from all right, title, interest, claim and equity of redemption in and to the said property and interests herein decreed to be sold;

That said property and interests so decreed to be sold are described as follows, to-wit:

All and singular the Pacific Heights Electric Railway, a railway beginning at the junction of Kaiulani Drive, a private way, and Booth Road, at Pauoa, Honolulu, Oahu, and running up and along said Kaiulani Drive two and one-half miles, more or less, following the windings of said road, to the summit station of said railway; and also all the roadway whereon said railway is located, and
61 rights of way for tracks and poles, and all sidings, stations, power house, track, poles, wires, hangers, appurtenances, steam plant, power generator, spare armature, light generator, all passenger, express and freight cars now built and in the course of construction, all station buildings, car sheds and other structures, and all tools, machinery, extra parts, rails, fish plates, stock on hand, blacksmith shop, chattels, appliances and supplies of every kind belonging or appurtenant to said railway;

And also all those tracts and parcels of land and all other property conveyed to said Trustee or intended so to be by deed of Charles S. Desky, dated June 25, 1902, and recorded in the Registry Office in said Honolulu in Liber — on pages —;

And also all the franchises owned or held by said Respondent The Pacific Heights Electric Railway Company, Limited, of every kind and description (save only its franchise to be a corporation), including its railway franchises, by it held or taken under and by virtue of its corporate articles or otherwise;

"Including also, as part of the property so to be sold as aforesaid, that certain cable hereinbefore mentioned as a 5593 foot, 4021 pounds, 4/0 Triple Braid Weather Proof Cable, and being now in the possession of said Honolulu Rapid Transit and Land Company," and also said Steam Condenser hereinbefore referred to as that sold by said The Pacific Heights Electric Railway Company, Limited, to the Respondent August Dreier.

Provided However that said Cable and said Steam Condenser shall not be sold unless the proceeds of sale of all other of said property shall prove insufficient to pay and satisfy all of said sums herein decreed to be paid, and in that event said Cable and Condenser shall be sold in the inverse order, in point of time, of their sale by said Pacific Heights Company, that is to say, said Steam Condenser shall be sold first, and then, if necessary, said Cable.

62 Done in open Court this 31st day of December, A. D. 1904.

(Sig.) W. J. ROBINSON,
Third Judge of the Circuit Court of the First Circuit, at Chambers, in Equity.

63 [Endorsed:] E. 1429. Circuit Court, First Circuit. Territory of Hawaii. At Chambers, in Equity. Before, Robinson, J. William O. Smith, Trustee, *vs.* The Pacific Heights Electric Railway Co. L't'd, *et al.* Decree. Filed December 31, 1904 At 10.20 O'clock A. M. (Sg.) M. Y. Simonton Clerk. Smith & Lewis Attorneys at Law Judd Building Honolulu, T. H.

64 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Honolulu in Liber 237 on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (Also Known as Ellen Polyblank), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents.

Bill for Forclosure. Trust Deed. (M. T. S.)

Commissioner's Return and Account of Sales.

To the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

M. T. Simonton, of Honolulu, Island of Oahu, Territory of Hawaii, a Commissioner duly appointed by the order and decree of this Honorable Court, duly given and made in the above entitled cause on the 31st day of December, A. D. 1904, respectfully makes and files the following return and account of sales made by him under the Decree of Forclosure and Sale, directing him to sell at public auction all and singular the property of the Pacific Heights Electric Company, Limited, described therein:

That in pursuance of said Decree of Foreclosure and Sale he caused notice of the time and place of holding such sale to be published in the English language in the Pacific Commercial
65 Advertiser, a newspaper of general circulation printed and published in Honolulu, for not less than once a week for four successive weeks before said sale (in which said notice the property to be sold was described), as will more fully appear by the Affidavit of Edward Dekum, Esq., marked Exhibit "A" hereunto annexed and made a part of this return.

Further notice of the time and place of holding such sale was given by having posters printed and put up in prominent places in Honolulu and vicinity (in which said posters the property to be sold was described), as will more full- appear by a copy of said posters, marked Exhibit "B," hereunto annexed and made a part hereof.

That at the time and place of holding such sale, specified in said notices, to-wit: on Saturday, the 4th day of February, A. D. 1905, at 12 o'clock noon of said day, at the front (mauka) entrance of the

Judiciary Building, in Honolulu aforesaid, said Commissioner caused, through O. A. Stevens, Esq., representative of James F. Morgan, Esq., a licensed auctioneer, to be sold at public auction the property described in said Decree of Foreclosure and Sale and said notices, save and except a certain cable, to-wit: a 5593 foot—4021 lbs. 4/0 Triple Braid Weather-proof cable.

That prior to the sale being cried, and subsequent to the reading of the Decree of Foreclosure and Sale and notice, said Commissioner made the following announcement:

"Since the filing of the Decree which has just been read, the respondent, The Honolulu Rapid Transit and Land Company, has sued out a Writ of Error in the Supreme Court from that portion of the Decree which directs the sale of the cable referred to in the said Decree; but, by written stipulation of all parties to the suit, it is agreed that the appeal shall not affect or delay the sale of the remaining property, other than said cable."

The Commissioner then caused the stipulation referred to to be read.

66 The following notice, received by the Commissioner from A. W. Neeley, Deputy Assessor, was also read prior to the sale:

"Office of Tax Assessor and Collector, P. O. Box 213.

HONOLULU, T. H., *February* 4, 1905.

"M. T. Simonton, Esq., Commissioner to sell the Pacific Heights Electric Railway Co., L't'd.

"DEAR SIR: You are hereby notified that the following delinquent taxes, assessed against the property of the Pacific Heights Electric Railway Co., L't'd, are still unpaid. As same are a lien on said property which is advertised to be sold this day and date, I respectfully request the same to be paid from the proceeds of the sale:

"1903- Tax, $250; 10% penalty, $25; Adv., 50c; total.....	$275.50
"1904, Tax, $250; 10% penalty, $25; total.....	275.00
"Total	$550.50

"Respectfully yours, A. W. NEELEY,
"Deputy Assessor 1st Taxation Division."

That the property so sold as aforesaid was offered and sold in two parts, all the property so sold, save and except the steam condenser referred to in said Decree, being sold first, and said steam condenser being sold last.

That at such sale C. G. Ballentyne, Esq., became the purchaser of the property first sold as aforesaid, for the sum of $1,100.00.

That August Dreier, Esq., became the purchaser of the steam condenser so sold as aforesaid, for the sum of $100.00.

That the said C. G. Ballentyne, Esq., and the said August Dreier, Esq., were the highest and best bidders respectively, and the respective sums above specified were the highest and best sums bid for the respective property so offered and sold as aforesaid.

That the undersigned is informed and believes and so states the fact to be that the respective sums bid and the amounts realized at such sale are and each of them is disproportionate to the value of the property so sold as aforesaid.

67 Wherefore, your Commissioner submits that said sale should not be confirmed, but that such further order should be made as to the Court may seem meet in the premises.

That the Account of Sales, marked Exhibit "C," hereunto annexed and made a part hereof, is true and correct.

That upon the conclusion of the sale aforesaid, said Commissioner announced that the sale of the cable heretofore referred to would be deferred for sixty days.

Respectfully submitted.

(Signed) M. T. SIMONTON,
Commissioner.

Dated Honolulu, Oahu, February 7, A. D. 1905.

Subscribed and sworn to before me, this 8th day of February, A. D. 1905.

(Signed) WM. R. SIMS,
Clerk Circuit Court, First Circuit.

Endorsed: Circuit Court First Circuit. Territory of Hawaii. At Chambers. In Equity. William O. Smith, Trustee, *vs.* The Pacific Heights Electric Railway Co. L't'd, *et al.* Commissioner's Return and Account of Sales. Filed Feb'y 8th 1905, at 12.00 o'clock M. Wm. R. Sims Clerk.

68 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Honolulu in Liber 237 on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (Also Known as Ellen Polyblank), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents

Bill for Forclosure. (M. T. S.) Trust Deed *of.*

Commissioner's Account of Sales.

Amount realized from sale of all and singular the property of the Pacific Heights Electric Railway, save and except the steam condenser.....	$1,100.00	
Amount realized from sale of steam condenser	100.00	
		$1,200.00

Expenses and Charges.

Pacific Commercial Advertiser (advertising)	$40.50	
Evening Bulletin (posters)	9.00	
Costs of Court	38.00	
Taxes due and unpaid	550.50	
Trustee's fee	200.00	
Attorney's fee	500.00	
		$1,338.00

69 Net deficit of sale (Exclusive of Commissioner's fee) $138.00

Amount of principal and interest due upon bonds up to and including the 1st day of October, A. D. 1904	$55,000.00	
Interest from the 1st day of October, A. D. 1904, to date of sale (February 4, 1905), 4 months 3 days, at 6% per annum	1,025.00	
		$56,025.00
Total deficiency (exclusive of Commissioner's fee)		$56,163.00

Dated: Honolulu, Oahu, February 8, 1905.

(Signed) M. T. SIMONTON,
Commissioner.

Subscribed and sworn to before me, this 8th day of February, A. D. 1905.

(Signed) WM. R. SIMS,
Clerk Circuit Court, First Circuit.

Since the foregoing report was completed, a statement of expenses incurred by the Trustee has been submitted to the Commissioner, and same is annexed hereto and marked Exhibit "D":

70 EXHIBIT "D."

Pacific Heights Ry. Trust in Account with W. O. Smith.

DEBITS.

1904.			
Aug. 3.	Paid Manuel Olveira, watchman at Power Station wages 27 da-s to July 31, 1904 at $1. per day		27
Sept. 7.	" Manuel Olveira wages to Sept. 1/04		31
10.	" Deposit of Costs in suit W. O. Smith Trustee *vs.* Pac. Heights Ry. Co. *et al.*		37
Oct. 5.	" Manuel Olveira wages to Oct. 1/04		30
24.	" Witness fees on subpœna of J. G. Pratt		1
Nov. 5.	" Manuel Olveira wages to Nov. 1/04		31
Dec. 3.	" " " " Dec. 1/04		30
1905.			
Jan. 3.	" " " " Jan. 1/05		31
Feb. 2.	" " " " Feb. 1/05		31

CREDITS.

Sept. 14.	Rec'd from Hono. R. T. & L. Co. for piece steel rail taken from Pac. H. R. Co.	....	1.20
1905.			
Feb. 6.	By Balance	....	247.80
		249	249
Feb. 6.	Balance due W. O. Smith	247.80	

C. & O. E.
W. O. SMITH,
Per R.

Hono., Feb. 6, 1905.

71 The Decree of Foreclosure and Sale provides "that said Commissioner shall apply the proceeds of such sale substantially in the manner in said trust provided, that is to say:

* * * * * * *

"Second: To the payment of all advances made or liabilities incurred by said Trustee in the care and preservation of said property at any time prior to the date of delivery of possession to the purchaser thereof, at such sale."

The total deficiency (exclusive of Commissioner's fee) ..	$56,163.00
Should therefore be increased by the sum of.....	247.00
Making total deficiency (exclusive of Commissioner's fee)	$56,410.80

Dated: Honolulu, Oahu, February 7, A. D. 1905.
(Signed) M. T. SIMONTON,
Commissioner.

Endorsed: Circuit Court First Circuit Territory of Hawaii At Chambers. In Equity. William O. Smith, Trustee, *vs.* The Pacific Heights Electric Railway Co. L't'd., *et al.* Commissioner's Account of Sales. Filed Feb'ry 8th 1905, at 12.00 o'clock M. Wm. R. Sims, Clerk.

72 EXHIBIT "A."

In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Commissioner's Sale *Re Sale* Pacific Heights Electric Railway.

Affidavit of Publication.

Edward Dekum of Honolulu being sworn, says that he has examined a file of the Pacific Commercial Advertiser a daily newspaper published in the English language at Honolulu and that the notice of which the annexed is a printed copy, was published in said newspaper five (5) times from Jan. 5th 1905 to Feb. 2 1905, viz: Jan. 5-

12-19-26-Feb. 2, 1905 and that the last publication was not less than — previous to the time therein appointed for the hearing.

(Signed) EDWARD DEKUM.

Subscribed and sworn to before me this 6th day of Febr'y 1905.

(Signed) GEORGE LUCAS,
Clerk of the Circuit Court of the 1st Circuit.

Endorsed: Circuit Court First Circuit. William O. Smith, Trustee *v.* Pacific Heights Electric Ry. *et al.* Affidavit of Publication. Filed February 6, 1905. M. T. Simonton Clerk.

Commissioner's Sale of all and Singular the Pacific Heights Electric Railway.

Pursuant to a decree duly made by the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, filed on the 31st day of December, A. D. 1904, in an action entitled "William O. Smith, as trustee under deed of trust recorded in the Registry Office in Honolulu in Liber 237, on pages 29 to 39, petitioner, *vs.* the Pacific Heights Electric Railway Company, Limited, an Hawaiian Corporation, August Dreier, Honolulu Rapid Transit and Land Company, Limited, an Hawaiian Corporation, Sister Albertina (Also known as Ellen Polyblank), as trustees for Stella K. Cockett and Charles S. Desky, respondents, bill for foreclosure of trust deed, equity division, No. 1429," the undersigned, as commissioner, duly appointed, will sell at public auction to the highest and best bidder, subject to confirmation of the court, on Saturday, the 4th day of Febuary, A. D. 1905, at 12 o'clock noon of said day, at the front (mauka) entrance of the Judiciary Building, in Honolulu, Island of Oahu, Territory of Hawaii, the following property and interests of the Pacific Heights Electric Railway Company, Limited, decreed to be sold:

All and singular the Pacific Heights Electric Railway, a railway beginning at the junction of Kaiulani Drive, a private way, and Booth Road, at Pauoa, Honolulu, Oahu, and running up and along said Kaiulani Drive two and one-half miles, more or less, following the wi-dənings of said road to the summit station of said railway; and also all the roadway whereon said railway is located, and rights of way for tracks and poles, and all sidings, stations, power house, track, poles, wires, hangers, appurtenances, steam plant, power generator, spare armature, light generator, all passenger, express and freight cars now built and in the course of construction, all station buildings, car sheds and other structures, and all tools, machinery, extra parts, rails, fish plates, stock on hand, blacksmith shop, chattels, appliances and supplies of every kind belonging or appurtenant to said railway;

And also all those tracts and parcels of land and all other property conveyed to said trustee, or intended so to be, by deed of Charles S. Desky, dated June 25, 1902, and recorded in the Registry Office in said Honolulu, in Liber —, on pages —.

And also all the franchises owned or held by said respondent, The Pacific Heights Electric Railway Company, Limited, of every kind

and description (save only its franchise to be a corporation), including its railway franchises, by it held or taken under and by virtue of its corporate articles or otherwise;

Including also, as part of the property so to be sold as aforesaid, that certain cable, referred to in the decree on file herein as a 5593 feet, 4021 pounds, 4-0 triple braid weather proof cable, and now being in the possession of said Honolulu Rapid Transit and Land Company and also the steam condenser referred to in said decree as that sold by said the Pacific Heights Electric Railway Company, Limited, to the respondent, August Dreier;

Provided, however, that said cable and said steam condenser shall not be sold unless the proceeds of sale of all other of said property shall prove insufficient to pay and satisfy all sums decreed to be paid, and in that event said cable and steam condenser shall be sold in the inverse order, in point of time, of their sale by said Pacific Heights Electric Railway Company, that is to say, said steam condenser shall be sold first, and then, if necessary, said cable.

Terms of Sale: Cash in United States gold coin; deed at expense of purchaser.

For further particulars apply to Messrs. Smith & Lewis or L. J. Warren, Esq., attorneys for petitioner, at their office, Judd Building, corner Fort and Merchant streets, Honolulu, or to the undersigned at his office in the Judiciary Building, at Honolulu aforesaid.

M. T. SIMONTON,
Commissioner.

Dated: Honolulu, Oahu, Territory of Hawaii, January 5, A. D. 1905.

6992—Jan. 5, 12, 19, 26, Feb. 2.

73 *Commissioner's Sale of all and Singular the Pacific Heights Electric Railway.*

Pursuant to a decree duly made by the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, filed on the 31st day of December, A. D. 1904, in an action entitled "William O. Smith, as trustee under deed of trust recorded in the Registry Office in Honolulu in Liber 237, on pages 29 to 39, petitioner, *vs.* the Pacific Heights Electric Railway Company, Limited, an Hawaiian Corporation, August Dreier, Honolulu Rapid Transit and Land Company, Limited, an Hawaiian Corporation, Sister Albertina (Also known as Ellen Polyblank), as trustees for Stella K. Cockett and Charles S. Desky, respondents, bill for foreclosure of trust deed, equity division, No. 1429," the undersigned, as commissioner, duly appointed, will sell at public auction to the highest and best bidder, subject to confirmation of the court, on Saturday, Feb. 4, A. D. 1905, at 12 o'clock noon of said day, at the front (mauka) entrance of the Judiciary Building, in Honolulu, Island of Oahu, Territory of Hawaii, the following property and interests of the Pacific Heights Electric Railway Company, Limited, decreed to be sold:

All and singular the Pacific Heights Electric Railway, a railway beginning at the junction of Kaiulani Drive, a private way, and

Booth Road, at Pauoa, Honolulu, Oahu, and running up and along said Kaiulani Drive two and one-half miles, more or less, following the windings of said road to the summit station of said railway; and also all the roadway whereon said railway is located, and rights of way for tracks and poles, and all sidings, stations, power house, track, poles, wires, hangers, appurtenances, steam plant, power generator, spare armature, light generator, all passenger, express and
74 freight cars now built and in the course of construction, all station buildings, car sheds and other structures, and all tools, machinery, extra parts, rails, fish plates, stock on hand, blacksmith shop, chattels, appliances and supplies of every kind belonging or appurtenant to said railway;

And also all those tracts and parcels of land and all other property conveyed to said trustee, or intended so to be, by deed of Charles S. Desky, dated June 25, 1902, and recorded in the Registry Office in said Honolulu, in Liber —, on pages —.

And also all the franchises owned or held by said respondent, The Pacific Heights Electric Railway Company, Limited, of every kind and description (save only its franchise to be a corporation), including its railway franchises, by it held or taken under and by virtue of its corporate articles or otherwise;

Including also, as part of the property so to be sold as aforesaid, that certain cable, referred to in the decree on file herein as A 5593—Foot, 4021-Pounds, 4-0 Triple Braid weather proof cable, and now being in the possession of said Honolulu Rapid Transit and Land Company and also the steam condenser referred to in said decree as that sold by said the Pacific Heights Electric Railway Company, Limited, to the respondent, August Dreier;

Provided, However, that said cable and said steam condenser shall not be sold unless the proceeds of sale of all other of said property shall prove insufficient to pay and satisfy all sums decreed to be paid, and in that event said cable and steam condenser shall be sold in the inverse order, in point of time, of their sale by said Pacific Heights Electric Railway Company, that is to say, said steam condenser shall be sold first, and then, if necessary, said cable.

Terms of Sale: Cash in United States gold coin; deed at expense of purchaser.

For further particulars apply to Messrs. Smith & Lewis or L. J. Warren, Esq., attorneys for petitioner, at their office, Judd Building, corner Fort and Merchant streets, Honolulu, or to the undersigned at his office in the Judiciary Building, at Honolulu aforesaid.

M. T. SIMONTON,
Commissioner.

Dated: Honolulu, Oahu, Territory of Hawaii, January 5, A. D. 1905.

The Evening Bulletin Print.

Endorsed: Exhibit B. Filed February 7th, 1905 at 9 o'clock A. M. M. T. Simonton, Clerk.

75 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Honolulu in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (also Known as ELLEN POLYBLANK), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Defendants.

Motion to Confirm Sale.

Now comes C. G. Ballentyne and moves to confirm the sale made to him and reported by the commissioner in this action.

C. G. BALLENTYNE,
(Sig.) By CASTLE & WITHINGTON,
His Attorneys.

Dated Honolulu, February 14, 1905.

[Endorsed:] Circuit Court, First Circuit Territory of Hawaii. William O. Smith, as Trustee under Deed of Trust recorded in the Registry Office in Honolulu in Liber 237 on pages 29 to 39 *vs.* The Pacific Heights Electric Railway Company *et al.* Motion to Confirm Sale Filed February 14, 1905 at 9.15 A. M. (S'g) J. A. Thompson Clerk Castle & Withington Attorneys for C. G. Ballentyne.

76 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

E. 1429.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (also Known as ELLEN POLYBLANK), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents.

Now comes William O. Smith, Trustee and Petitioner as above named, and upon the coming in and filing in this Court of the Return and Report of Sale of M. T. Simonton, Commissioner herein by this Court appointed in the Decree heretofore made and entered in this cause to sell the property in said decree described and directed to be sold and respectfully protests and objects against the confirmation of

the sales in said Commissioner's Report referred to; and prays that the sales in said Report mentioned be set aside and the said Commissioner ordered and directed to re-sell said properties at such time and place and upon such terms and notice as to this Honorable Court shall seem just and for the best interest of all parties herein.

"And the said William O. Smith Trustee as aforesaid, represents, as the ground for his objection and protest herein, that the highest and best sums bid for the properties, respectively, at said sale in said Commissioner's report mentioned as held on February 4th,
77 1905, were and are grossly inadequate, insufficient, and disproportionate to the real and reasonable values of the properties offered at said sale, respectively, and to the prices which may in fact be had and obtained; and the further ground that a confirmation of said sales made on said 4th day of February, 1905, for the prices then and there offered, respectively, would be unjust and unfair to the Petitioner in this cause and to all the parties hereto."

And in support of said objections the said William O. Smith, Trustee as aforesaid, prays leave to adduce before this Court, at the hearing of said Commissioner's Report and proceedings had in connection therewith, the sworn testimony of witnesses with respect to the real and true values of the property by said decree directed to be sold; said objections being further based upon all the papers, records and files in said cause, to all of which reference is hereby made and the same made part hereof.

Dated, February 13th, 1905.

(Signed) WILLIAM O. SMITH,
Trustee and Petitioner as aforesaid.

(S'g'd) LOUIS J. WARREN,
(S'g'd) SMITH & LEWIS,
Attorneys for Petitioner.

78 [Endorsed:] E. 1429. Circuit Court, First Circuit Territory of Hawaii at Chambers In Equity. William O. Smith, Trustee, *vs.* The Pacific Heights Electric Railway Company, L't'd *et al.* Objection of Trustee to Confirmation of Commissioner's Sale. Copy. Filed February 13th 1905 at 12.20 o'clock P. M. (Sg.) M. T. Simonton Clerk Smith & Lewis Attorneys at Law Judd Building Honolulu, T. H.

79 Copy.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (also Known as ELLEN POLYBLANK), as Trustee for Stella K. Cockett, CHARLES S. DESKY, Respondents.

Protest of the Pacific Heights Electric Railway Company, Limited, and of Charles S. Desky, Respondents, to Confirmation of Sales.

Now come The Pacific Heights Electric Railway Company, Limited, an Hawaiian corporation, by its President Charles S. Desky, and Charles S. Desky, Respondents herein, and by way of answer to the Return and Report of Sales of M. T. Simonton, Esq., the Commissioner hereby by this Court appointed in its Decree to sell the property in said decree ordered to be sold, said Report having been filed in this Court on the 8th day of February, 1905, respectfully represent to this Court that the sales made by said Commissioner on the 4th day of February, 1905, as in said Report particularly mentioned, should not be confirmed by this Court, but that the recommendation of said Commissioner, in said Report contained, against confirmation, be adopted; and these Respondents do hereby jointly and severally object and protest against a confirmation of said sales, and
80 aver that the highest prices bid at said sales for the properties offered respectively, are altogether disproportionate to the true values of said properties and to the prices which may be obtained upon a re-sale thereof under proper terms and conditions, and are grossly inadequate and unreasonable, and that a confirmation of said sales so made would work great injustice and hardship upon and be greatly unfair to the Respondent The Pacific Heights Electric Railway Company, Limited, in that it would unnecessarily and without cause increase the amount of the deficiency judgment which shall or may be entered against said last named Respondent after final return and account of sales and the application of the proceeds, if any, toward the judgment debt decreed to be due from said last named Respondent to the Petitioner in said cause.

And these Respondents pray that a re-sale of said property may be ordered to be made by said Commissioner, and particularly, that the property be directed to be sold in separate parts and parcels and not as a whole property.

Dated, Honolulu, February 13th, 1905.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED,

(Sg.) By CHAS. S. DESKY, *Its President.*

(Sg.) CHAS. S. DESKY.

81 [Endorsed:] Smith *v.* Pac. Heights Co. Protest of Pac. Heights Co. & of Desky to Confirmation of Sales. Filed February 13th 1905 at 12 o'clock M. (Sg.) M. T. Simonton Clerk.

82 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, Trustee, etc., Petitioner,
vs.
THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, L'T'D, ET AL., Respondents.

Bill for Foreclosure of Trust Deed.

Decision and Order Confirming Sale in Part and Disaffirming Sale in Part.

On the 4th day of February, A. D. 1905, pursuant to the decree of foreclosure and sale duly given and made in the above entitled cause on the 31st day of December, A. D. 1904, M. T. Simonton, Esq., the commissioner duly appointed by this court in and by said decree, offered for sale at public auction, the property described in said decree, save and except a certain cable, to wit: a 5593 foot - 4021 lbs. 4/0 Triple Braid Weather Proof cable. Notice of the time and place of said sale was given by publication and posting in the manner and for the time prescribed in and by said decree and the proof is plenary that said sale was in all respects legally made and fairly conducted.

In his report and return and account of sales, filed herein on February 8th 1905, the commissioner reports that at said sale all of the property mentioned and described in the decree with the exception above noted, was offered for sale and sold in two parts, C. G.
83 Ballentyne, Esq., having become the purchaser of the property first described in the decree, comprising all of the property of The Pacific Heights Electric Railway Company, L't'd, save and except the steam condenser (pump) mentioned and described in the decree, and also, the cable therein described and above referred to, for the price or sum of $1100, he being the highest and best bidder therefor, and August Dreier, Esq., became the purchaser of the steam condenser (pump) mentioned and described in said decree for the price or sum of $100, he being the highest and best bidder therefor. In his return and report the commissioner alleges that he is informed and believes and so states the fact to be that the respective sums bid and the amounts realized at such sales are and each of them is disproportionate to the value of the property so sold as aforesaid, and, therefore, submits that said sales should not be confirmed, but that such further order should be made as to the court may seem meet and proper.

Prior to the time of hearing the return and account of sales and report of the commissioner, C. G. Ballentyne, one of the bidders at said sale, filed a written motion for an order confirming the sale to him as to all the property offered at said sale as to which he was the highest and best bidder, and August Dreier, one of the bidders at said

sale, filed a written motion for an order confirming the sale to him as to the steam condenser (pump) offered at such sale as to which he was the highest and best bidder, and the petitioner, William O. Smith, Trustee, filed a written protest and objection to the confirmation of said sales on the grounds and for the reasons that the highest and best sums bid at said sales for the properties respectively offered at said sale- in said commissioner's report mentioned as held on February 4th 1905, were and are grossly inadequate, insuffi-
84 cient and disproportionate to the real and reasonable values of the properties offered at said sale-, respectively, and to the prices which may, in fact, *he* had and obtained; and that a confirmation of said sales made on the 4th day of February, 1905, for the prices then and there offered, respectively, would be unjust and unfair to the petitioner and to all the parties to this cause, and the respondents, The Pacific Heights Electric Railway Company, Limited, and Charles S. Desky, also filed a written protest and objection to the confirmation of said sales on the grounds and for the reasons that the highest prices bid at said sales for the properties offered respectively are altogether disproportionate to the true values of said properties and to the prices which may be obtained upon a re-sale thereof under proper terms and conditions and are grossly inadequate and unreasonable, and that a confirmation of said sales so made would work great injustice and hardship upon and be greatly unfair to the respondent, The Pacific Heights Electric Railway Company, Limited, in that it would unnecessarily and without cause increase the amount of the deficiency judgment which shall or may be entered against said last named respondent after final return and account of sales and the application of the proceeds, if any, toward the judgment debt decreed to be due from said last named respondent to the petitioner in said cause.

Upon the hearing of said return a vast deal of evidence was adduced tending to show the actual value of the property offered for sale by the commissioner pursuant to the decree of this court. As far as the highest and best price or sum bid for the steam condenser is concerned, this court cannot say from the evidence that the sum bid, namely, $100, is grossly inadequate to the actual value of the property offered for sale. Indeed, the only evidence as to this
85 item is that while a year or more ago it was reasonably worth the sum of $630., at the present time its actual value was only equal to the price a person who desired such an article was willing to pay for, depending upon the urgency of the needs of the prospective purchaser for such an article, as it had no market value, and the witness, called as an expert as to the values of such articles, testified that he would not give $50. for it. But the evidence is overwhelming that the actual value of the property first described in the decree is at least seven times the amount of the highest and best bid therefor received at the sale, namely, $1100. It is true that there is no evidence as to the actual value of the property as a whole, the manner in which it was advertised and offered for sale, but surely the actual value of any property as a whole cannot be less than the aggregate of the actual values of its integral parts.

Counsel for the highest bidder at the sale for the property first de-

scribed in the decree contends that mere inadequacy in price, in the absence of any showing of fraud or irregularity, will not justify the court in setting aside a judicial sale, and that in the present instance the sale should be confirmed, it having been regularly made and fairly conducted, and the objectors disclaiming any fraud or misrepresentation on the part of the bidder. But counsel seems to have overlooked the fact that this is not an application to *set aside a sale* but merely a hearing upon a return of sale for the purpose of determining whether or not the sale should be confirmed. As applied to certain classes of cases, where the sale is absolute and complete at the time of the offering for sale, as, for instance, a sale under execution, doubtless, the rule of law is correctly stated. But where the sale is strictly judicial, as in the case at bar,—where the sale is con-
86 ditional upon confirmation by the court, and the bidder acquires no absolute right or vested interest in the property for which he has bid at any time prior to confirmation,—the rule contended for has no application. A commissioner appointed by a decree of foreclosure and sale, directing him to sell specific property, is a mere agent of the court, acting under its authority and pursuant to its direction, and not a ministerial officer acting in the discharge of a duty imposed upon him by law.

The distinction between judicial sales, strictly so-called, and those sales which are ministerial in character or which are executed under a power of sale created by contract is not a fanciful one, but one which is actual and real, and one which in the nature of things must exist. It would be difficult, if not impossible, in the limited time at my disposal, to cite the numerous authorities bearing upon the various classes of sales. Indeed, in view of the very extensive and able brief filed by counsel for the petitioner in support of his objections to the confirmation of the commissioner's sale in the case at bar, such an effort on my part would be a work of supererogation. And in this connection, I cannot too strongly commend counsel for petitioner for the amount of patient care and intelligent research exhibited in their brief, or to thank them too cordially for the invaluable assistance which their brief has afforded me in arriving at a conclusion in the matter now under consideration.

Under a judicial sale, no bidder acquires any interest in the property for which he has bid, and upon the coming in of the return and report of the commissioner, referee or receiver, and after a hearing upon the same, the confirmation or disaffirmance of the sale is a matter which rests absolutely with the court, in the exercise of a sound judicial discretion. If it appears to the satisfaction o fthe court,
87 upon due proof, that the price or sum bid is disproportionate to the value of the property offered for sale to such an extent that upon a resale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale,—can be obtained, it is the duty of the court to order a re-sale, and a failure on the part of the court to discharge its duty in this particular would, on appeal, constitute reversible error. It is the duty of a court of equity, in all cases before it, and especially in a suit to enforce and foreclose a lien upon specific property to see to it that the rights and interests of all parties in interest are conserved and protected, and it

would be unconscionable to adopt an arbitrary rule for the guidance of a court of good conscience and of equal, exact and substantial justice, which would tie its hands and defeat the chief purpose of its creation and existence.

I am satisfied, in the case at bar, that the price or sum bid at the commissioner's sale for the property first described in the decree, is grossly inadequate and disproportionate to the value of the property offered for sale and that an amount vastly in excess of the price or sum bid, exclusive of the expenses of a new sale, can be obtained on a re-sale thereof. As it is the wish of the parties, expressed in open court, that in the event of a re-sale of the property first described in the decree, that the same should be sold in lots and parcels and not as a whole, and as the evidence tends to show that a greater price could be obtained for said property if sold in lots and parcels, in my judgment it would be for the best interests of all parties concerned that upon a re-sale said property should be sold in lots and parcels and not as a whole.

It is ordered that the sale by the commissioner of the steam condenser (pump) to August Dreier for the price or sum of
88 & 89 $100. he being the highest and best bidder therefor, and said sum being the highest and best sum bid, be and the same is hereby approved and confirmed and declared valid, and the said commissioner is hereby authorized and directed to make, execute and deliver to the said purchaser a good and sufficient bill of sale or other instrument of transfer or assignment thereof, upon the receipt by him of the price or sum bid therefor.

It is further ordered that the sale by said commissioner of the property first described in the decree of foreclosure and sale heretofore made and entered herein to C. G. Ballentyne for the price or sum of $1100., be and the same is hereby disapproved and disaffirmed, and that said first described property be re-sold and a re-sale thereof be had by the said commissioner in lots and parcels and not as a whole, upon the same terms and conditions and upon giving the same notice by publication and by posting as directed and prescribed in and by said decree of foreclosure and sale; said commissioner to make due and full return of such sale and of all proceedings had and taken by him under and pursuant to this order to this court for its approval and confirmation within ninety (90) days from the date of this order. All costs and expenses of both sales to abide the result of the re-sale hereby ordered.

Dated, Honolulu, April 10th, A. D. 1905.

(Signed) W. J. ROBINSON,
Third Judge, First Circuit Court.

Endorsed: Equity 1429. Circuit Court, First Circuit, Territory of Hawaii. W. O. Smith, Trustee, etc. Petitioner *vs.* The Pacific Heights Electric Railway Company, L't'd *et al.* Order confirming sale in part and disaffirming sale in part. R. 1/198 J. M. Filed April 10, 1905, at 10 o'clock A. M. M. T. Simonton, Clerk.

90 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

WILLIAM O. SMITH, as Trustee under Deed of Trust Recorded in the Registry Office in Honolulu, in Liber 237, on Pages 29 to 39, Petitioner,

vs.

THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, an Hawaiian Corporation; AUGUST DREIER, HONOLULU RAPID TRANSIT AND LAND COMPANY, LIMITED, an Hawaiian Corporation; SISTER ALBERTINA (Also Known as Ellen Polyblank), as Trustee for Stella K. Cockett, and CHARLES S. DESKY, Respondents.

Bill for Foreclosure of Trust Deed.

Notice of Appeal.

And now comes the Repondent, the Honolulu Rapid Transit and Land Company, Limited, and C. G. Ballentyne, a purchaser of property described in the Bill filed in the above entitled cause, at a sale thereof duly held on February 4th A. D. 1905, by M. T. Simonton, Esq., Commissioner thereunto duly appointed, and they and each of them, do hereby appeal to the Supreme Court of the Territory of Hawaii from the order and decree of the Honorable W. J. Robinson, Third Judge of the said Circuit Court, made and filed on the 10th day of April, A. D. 1905, refusing to confirm the report of said Commissioner and the said sale to said C. G. Ballentyne, held by said Commissioner as above set forth, and ordering a re-sale of the property aforesaid, and from every part of said decree; and hereby give notice thereof.

Dated at Honolulu April 12th, A. D. 1905.

HONOLULU RAPID TRANSIT
AND LAND CO., LTD.,
C. G. BALLENTYNE,
(Sgd.) By CASTLE & WITHINGTON,
Their Attorneys.

[Endorsed:] Smith, Trustee, In Eq., *vs.* Pacific Heights Elec. Rwy. Co., *et als.* Notice of Appeal. Filed 12th April 1905. (Sgd.) George Lucas, Clerk.

91 WILLIAM O. SMITH, Trustee,

v.

THE PACIFIC HEIGHTS RAILWAY COMPANY, LIMITED, HONOLULU RAPID TRANSIT & LAND COMPANY, LIMITED, C. G. BALLENTYNE, and C. S. DESKY.

Appeals from Circuit Judge, First Circuit.

Argued October 3, 4, 1905; Decided October 30, 1905.

Frear, C. J., Hartwell and Wilder, JJ.

Judicial sales—setting aside for inadequacy of price.—A judicial sale may be set aside before confirmation for such gross inadequacy of price as shocks the conscience or raises a presumption of unfairness, but not for mere inadequacy unless accompanied by other circumstances such as fraud, accident, mistake, etc. Whether such a sale should be set aside or confirmed is largely a matter of sound judicial discretion and a decision by the trial judge in a case of this nature should not be reversed unless clearly erroneous.

Opinion of the Court, by Frear, C. J.

This is an appeal from an order setting aside a sale and directing a new sale in foreclosure proceedings.

The suit was brought by the trustee for the bondholders of the Pacific Heights Railway Company, most of the stock of which was owned by the defendant Desky. It is claimed that the property cost $78,000 exclusive of the right of way only four years before. It was bonded for $50,000. A decree of foreclosure was entered and a sale ordered to be made through a commissioner appointed for the purpose. The property, consisting of lands, right of way, cars, electrical equipment, power house, rails, etc., was sold as a whole
92 for $1100, excepting a certain cable which was not sold and a steam condenser which was sold separately for $100. The commissioner reported with a recommendation that the sale be not confirmed owing to inadequacy of price. The circuit judge, after taking much testimony, confirmed the sale of the steam condenser but disaffirmed the sale of the rest of the property and ordered a new sale. He expressed the opinion that a judicial sale before confirmation, unlike an execution sale which requires no confirmation or a judicial sale after confirmation, could be set aside in the discretion of the court for mere inadequacy of price and, indeed, that it was the duty of the court to order a resale if it appeared that the price obtained was inadequate to such an extent that upon a resale a price could be obtained sufficiently greater to more than cover the expenses of the new sale. He found however that in this case the price bid was grossly inadequate, that an amount vastly in excess of such price, exclusive of the expenses of the new sale, could be obtained upon a resale, and that a greater price could be obtained for the property if sold in parcels than if sold as a whole, and ordered a resale in

parcels, from which order the purchaser, the defendant Ballentyne, and the defendant Honolulu Rapid Transit & Land Company, which claims under him, appeal.

The principal question is one of law—as to the rule by which a court should be governed in determining whether a judicial sale should be confirmed or set aside, and more particularly what weight should be given to inadequacy of price when relied on as a ground for setting aside a sale. The appellants contend that a sale, whether judicial or nonjudicial, cannot be set aside, even before confirmation, upon the ground of inadequacy of price, however gross that may be, but that inadequacy if relied on must, in order to justify a resale, be accompanied by other circumstances such as fraud, accident, mistake, etc. The appellees contend that judicial sales before confirmation, unlike such sales after confirmation or nonjudicial sales which do not require confirmation, may be set aside as a matter of sound discretion for mere inadequacy of price, even though the inadequacy is not gross and even though it is unaccompanied
93 by such other circumstances. In our opinion each of these is an extreme view. The rule best sustained by both reason and authority, as it seems to us, is that, although mere inadequacy is insufficient unless accompanied by other circumstances, inadequacy so gross as to shock the conscience or imply unfairness in the sale is sufficient for setting aside a judicial sale before confirmation. If the inadequacy is not gross, it should be accompanied by other circumstances, and of course other circumstances alone may be sufficient.

There is, no doubt, as contended by the appellees, a distinction between strictly judicial sales, such as sales in partition, guardianship, administration, receivership, foreclosure, admiralty, etc., proceedings on the one hand, and strictly legal sales, whether founded upon judgments or decrees, as in the case of ordinary executions, or on contract, as in the case of foreclosure under a power of sale, on the other hand. There is perhaps also a third and intermediate class of sales under special statutory provisions in which this distinction is more or less obliterated. Judicial sales are in theory made by the court itself, though acting through an officer appointed for the purpose, who reports his doings to the court, and are not complete until confirmed by the court. Nonjudicial sales are usually made by a public officer acting ministerially under statutory, not judicial, authority or by a person acting under contract authority and are complete as soon as made. They require no confirmation. There are other distinctions between these classes of sales that need not be referred to at this time. It may at first impression seem to follow from the distinction mentioned that the confirmation or setting aside of a judicial sale is a matter purely within the discretion of the court and that such sale might properly be disaffirmed for mere inadequacy of price even though slight,—and discretion almost as wide as that was exercised in early English practice and is exercised still in at least one American state, but, as a result of the pernicious consequences of that practice shown by experience, that is not the
94 rule now either in England, where it was long ago disapproved judicially and has since been changed by statute, or generally

in the United States, where it has been changed by judicial decisions. This change by judicial decisions in America has not, however, gone generally to the extent contended for by the appellants of requiring that inadequacy even though so gross as to shock the conscience should be accompanied by other circumstances in order to justify setting aside a judicial sale before confirmation, though it cannot be denied that the change has gone to that extent in some states.

The law upon this subject has been presented by counsel at great length but it will not be of any advantage to review the numerous cases cited. Counsel on each side endeavor to show that the decisions relied upon by counsel on the other side are some of them inapplicable and others erroneous. They also quote different passages from the same authors in support of their respective positions. The inadvisability of discussing extensively the cases and text books cited may be shown by a single illustration, which will at the same time throw some light upon the state of the law upon this subject. In Graffam *v.* Burgess, 117 U. S. 180, the Supreme Court of the United States, referring to strictly judicial sales before confirmation, after stating the early English rule that biddings would be opened upon a mere offer to advance the price ten per centum and Lord Eldon's expressed dissatisfaction with that practice and the change of the rule in England by statute, said: "In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal, that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed," and, after citing in support of that statement a list of cases covering half a page, added: "From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy,
95 the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold." The appellants contend that the conclusion thus announced is too liberal and in opposition to it cite Freeman (2 Exec. 3d Ed. 304*i*) who, after quoting it, states that there is no dissent from that part of it which makes great inadequacy of price accompanied by other circumstances sufficient, but in regard to the conclusion that inadequacy alone, though so gross as to shock the conscience, is sufficient, says: "We think the decided weight of authority in the United States does not sustain this conclusion, and that, on the contrary, it asserts that, where there is no irregularity or unfairness, or, in other words, nothing but inadequacy, urged as a ground for refusing confirmation, it must fall, though the inadequacy be very clearly established and be so great that it may well be characterized as gross." The cases cited by the author do not bear him out. The appellees, on the other hand, contend that the conclusion in the Graffam case is too

narrow and cite Trust Co. *v.* Street Ry. Co., 96 Ia. 646, in which the supreme court of Iowa rejected that conclusion on the ground that is was a mere dictum inasmuch as the sale in that (the Graffam) case was an execution and not a judicial sale, and held that mere inadequacy, though not so great as to shock the conscience, was sufficient for setting aside a judicial sale, and in support of that view quoted from section 311 of Freeman, where, after pointing out the "vast difference between execution sales and those made under decrees of chancery or probate courts in respect to the rights of the purchaser and the power of the courts," the author says that in sales "made under decrees, and which may, therefore, properly be called 'judicial sales,' when the proceedings are reported to the court, a purchaser is simply a preferred bidder. The court is not bound to accept the bid, and may, in its discretion, refuse to confirm the sale for many reasons which would have no application where
96 the purchase was made under execution." The appellants in reply cite another portion of section 304*i* of Freeman in which the author, after stating that some American courts follow the early English rule and others follow the rule that gross inadequacy alone is sufficient, says: "From this statement we except the decisions of the Supreme Court of Iowa. It maintains that, in the case of a judicial sale, when no right of redemption exists, the sale must be approved by the court, and that such approval may properly be withheld solely on the ground of inadequacy of price," apparently meaning that the Iowa court stands alone in holding that inadequacy though not gross is sufficient.

We will quote from several text books relied on in part by counsel on each side, and refer to several decisions in the federal courts. In addition to the quotations already made from Freeman, the following is from section 304*d*: "It is, perhaps, not correct to say that any of our courts have either absolutely adopted or absolutely rejected the English rule respecting the opening of the biddings on an offer of an increased bid. Whether they shall be opened is a question addressed to the sound discretion of the court making the sale, to be determined from all the circumstances, and such determination will rarely be reviewed upon appeal." Rorer (Judicial Sales, Sec. 28) says: "The view that confirmation may not be refused for mere inadequacy of price is clearly against the current of authorities in regard to judicial sales, and as a doctrine, is applicable only to execution sales at law, which will not be set aside for mere inadequacy of price," and (Sec. 106), "the chancellor has a broad discretion in the approval or disapproval of such sales," and (Sec. 549) "if there be no fact or circumstance relied on to set a sale aside but inadequacy of price, then the inadequacy must be such as in itself to raise the presumption of fraud, or else the sale will not be disturbed. But if in addition to such inadequacy there be any appearance of unfairness, or any circumstance, accident, or occurrence in relation to the sale of a character tending to cause such inadequacy, then the sale will be set aside; but inadequacy of price is still the main
97 ground of disturbing the sale, for if the price were full value, or even a passable one, then the objectionable facts or circum-

stances could have worked no evil." In 17 Am. & Eng. Enc. of L., 2d Ed., 1000-1002, the rule is stated thus: "It is well established that, as a general rule, a judicial sale will not be set aside on account of mere inadequacy in the price realized thereat. But, on the other hand, it is well recognized that a sale may be set aside where the inadequacy is so gross as to shock the conscience, or raise a presumption of fraud, or unfairness, or mistake." Jones (2 Mortgages, 6th Ed. Sec. 1638) says: "It rests wholly in the discretion of the court whether the sale shall be confirmed or not, and this power will be exercised prudently and fairly in the interests of all concerned," and (Sec. 1641) "the inadequacy of price may be such as to be of itself an indication of fraud or unfairness; but if not so gross as to indicate fraud, when taken in connection with other circumstances, it is ground for setting the sale aside and ordering a resale." Wiltsie (Mortgage Foreclosures, Sec. 536) says: "A sale may be set aside, especially before confirmation, for fraud, unfairness or irregularity or for want of notice, but it seems not for mere inadequacy of price, unless it results in a clear sacrifice," and (Sec. 539) "mere inadequacy of the price brought by the mortgaged premises on a foreclosure sale is not a sufficient ground for ordering a resale of the premises, unless the inadequacy is so great as to be evidence of unfairness or fraud." Many cases are cited in these works in support of the various statements made.

Referring to the cases in the federal courts,—it is true that the Graffam case above mentioned was an independent suit in equity to set aside an execution sale, but the remarks of the court above quoted were made with reference to setting aside or confirming judicial sales proper. The court was not misled into applying to judicial sales the rule applicable to execution sales. On the contrary it tended rather to apply even to execution sales the rule applicable to judicial sales. The conclusions of the court in regard to
98 judicial sales were evidently drawn after careful investigation and consideration and, considering the high authority of the court, are entitled to great weight. They were approved in Pewabic Mining Co. *v.* Mason, 145 U. S. 367, an appeal from the confirmation of a judicial sale, and in Schroeder *v.* Young, 161 U. S. 334, a suit to set aside an execution sale. The same view is taken by other federal courts. The circuit court of appeals in Magann *v.* Segal, 92 Fed. 252, gives one of the most satisfactory reviews of the law, both English and American, upon this subject and refers not only to cases in the federal supreme court but to a number of cases in the federal circuit courts. The court, among other things, quotes from an earlier federal decision as follows: "Until the practice is in some way satisfactorily regulated, the best solution of the subject seems to be to hold closely to the public policy which protects the sales against instability by refusing to set them aside, unless the price offered in advance is so great, in proportion to the bid already made, that it affords substantial evidence that for some perhaps unknown reason, the property has been greatly undersold,—so much so that the purchaser has not merely a bargain, with a fair margin for profit, but an unconscionable advantage of the parties for whose benefit the

sale has been made." The court also says: "Upon the weight of American authority, we conclude that mere inadequacy of price, unless so great as to shock the conscience, will not justify the reopening of biddings. * * * On the other hand it is not expedient that the court shall lose all control over such sales. * * * A price so inadequate as to shock the conscience, or mere inadequacy, coupled with misconduct upon the part of those conducting the sale, or fraud, or conduct bordering upon fraud upon the part of the purchaser under the practice of both English and American courts, has always been regarded as furnishing good cause for reopening the biddings." See also Fed. Ins. & S. D. Co. *v.* Roanoke St. R. Co., 98 Id. 475, and Files *v.* Brown, 124 Id. 133. The federal decisions all seem to be to the effect that gross inadequacy such
99 as shocks the conscience or implies unfairness in the sale is sufficient to justify setting it aside. This view seems to receive most support from the state courts also.

This is the view that was taken in Smith *v.* S. S. City of Columbia, 11 Haw. 709, in which this court says: "There is but little doubt that the general rule governing the confirmation of a judicial sale is that the sale, if regular, will be confirmed unless the price obtained is so grossly inadequate to the value of the property sold as to shock the conscience of the court and be presumptive evidence of fraud. We find that there was no irregularity in the sale and the only ground upon which the sale is attacked is that of gross inadequacy," and, after reviewing the evidence, "We feel obliged, in view of the evidence adduced, to hold that the value that the vessel would produce to the purchaser is not so grossly inadequate as to authorize a resale." In view of what has been said it is evident that appellees' contention that the court in the case just referred to was misled through inadvertance or otherwise into applying to a judicial sale a rule applicable only to execution sales, is without foundation and, on the other hand, that appellants' contention that the court was of the opinion that there must be not only such gross inadequacy as to shock the conscience, but also other evidence of fraud, is equally untenable. It is true the court used the expressions "shock the conscience" and "be presumptive evidence of fraud" in the conjunctive, although similar expressions when coupled in other cases and in the text books are generally stated in the disjunctive, and yet it is clear that the court did not intend these as being two different or unconnected things which must unite in order to warrant setting aside a sale. Not only is the word "fraud" used in expressions of this kind in a general sense as including surprise, accident, mistake, irregularity, etc., as well as fraud, misrepresentation, misconduct, etc., but it is the grossness of the inadequacy which implies the fraud or unfairness, and it is sufficient if the inadequacy is so great as to imply
that, even though it does not suggest the nature of the fraud
100 and there is nothing else to show in what it consisted. As stated in one of the quotations above made, it is sufficient if the grossness of the inadequacy is such as to afford substantial evidence that for some perhaps unknown reason the property has been greatly undersold.

No inflexible rule can be laid down for all cases. More would be required for setting aside an execution sale or a judicial sale after confirmation than a judicial sale before confirmation. More might also be required for setting aside certain classes of judicial sales before confirmation, as, for instance, when such sales must be made of necessity or of right and the main object is to obtain the proceeds for the purpose of paying a debt on foreclosure of mortgage or otherwise, than for setting aside other judicial sales before confirmation, as, for instance, when the main object is not to obtain money for the purpose of paying an obligation but to sell the property for some purpose, as, for instance, to realize on it before it depreciates in value or for the purpose of acquiring means for improving an estate or making a better investment. The main idea is on the one hand to maintain the stability of judicial sales and not deter bidders by rendering such sales liable to be set aside for trival reasons and on the other hand to protect interested parties and not unduly sacrifice their property.

In the present case the appellees contend that there are other circumstances which would justify setting aside the sale in conjunction with the inadequacy of the price even if gross inadequacy alone were not enough or if it were found that there was not gross inadequacy in this case. For instance, it is claimed that the defendant Desky who, next to the bondholders, was most interested in the property, was excusably misled into supposing that the sale was to occur at a different time or place and so was unable to be present. Another circumstance claimed is that although the decree directed the commissioner to "sell all and singular the property * * * or so much thereof as shall be necessary," which, it is contended, meant a sale in parcels, the trustee and the bondholders, intending to bid it in themselves, agreed that it should be sold as a whole, and that
101 the fact that it was generally known that the bondholders intended to bid led some who might otherwise attend and bid to remain away from the sale and others to attend unprepared to bid, and that the bondholders changed their minds at the last moment and refrained from bidding. How far these alleged circumstances are sustained by the evidence or whether, if sustained, they would be sufficient in addition to inadequacy, if anything in addition were needed, for setting aside the sale, we need not say. In Schroeder *v.* Young, 161 U. S. 337, the court states that where there is inadequacy of price courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as, for example, if the sale has been attended by any irregularity or if several lots have been sold in bulk when they should have been sold separately or sold in such manner that their full value could not be realized, or if bidders have been kept away, etc., and similar views have been expressed by other courts. In this case the circuit judge found not only that the price bid was grossly inadequate and that an amount vastly in excess of that could be obtained on a resale, but that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the highest price bid and that a higher price could be obtained for the property if sold in parcels than as a whole.

It is evident that the property could not be sold as a whole as a going concern; it could be sold only as a wreckage proposition whether sold as a whole or in parcels. Some courts and text writers take the view that matters of this sort are so much within the discretion of the trial judge that they are not appealable, but the better opinion, as it seems to us, elsewhere and the one that is in conformity with our own practice, is that orders confirming or setting aside judicial sales are reviewable but that they should not be reversed except where they are clearly erroneous. Considerable weight should be given to the opinion of the trial judge in a matter of this kind. Under the circumstances we are of the opinion that the order appealed from should not be reversed and accordingly it is affirmed.

102 Castle & Withington for H. R. T. & L. Co. and C. G. Ballentyne, appellants.

Smith & Lewis and L. J. Warren for the trustee, appellee.

Thayer & Hemenway for Pac. Heights Ry. Co. and C. S. Desky, appellees.

(Sg) W. F. FREAR.
(Sg) ALFRED S. HARTWELL.
(Sg) A. A. WILDER.

Endorsed: Filed October 3d, 1905 (Sg) George Lucas Clerk.

103 In the Supreme Court of the United States.

C. G. BALLENTYNE, and HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellants,
vs.
WILLIAM O. SMITH, Trustee; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, and C. S. DESKY, Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To William O. Smith, The Pacific Heights Electric Railway Company, Limited, and C. S. Desky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this Writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein C. G. Ballentyne and Honolulu Rapid Transit and Land Company are appellants, and you, William O. Smith, Trustee, The Pacific Heights Electric Railway Company, Limited and C. S. Desky are appellees, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter F. Frear, Chief Justice of Supreme Court of the Territory of Hawaii, this 7th day of December, in the year of our Lord one thousand nine hundred and five.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

104 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

In Equity.

WILLIAM O. SMITH, Trustee,
vs.
THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED; HONOLULU RAPID TRANSIT AND LAND COMPANY; C. G. BALLENTYNE and C. S. DESKY.

Appeal.

The above named parties, C. G. Ballentyne and Honolulu Rapid Transit and Land Company, conceiving themselves aggrieved by the order entered on the 30th — October 1905, in the above entitled proceeding, do hereby appeal from said order to the Supreme Court of the United States, and pray that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

W. R. CASTLE,
D. L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for the Appellants, C. G. Ballentyne and Honolulu Rapid Transit and Land Company.

Honolulu, H. T. 4th December 1905.

And now, to-wit: On the 7th December 1905, it is ordered that the appeal be allowed as prayed for.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

105 [Endorsed:] Supreme Court of the United States. C. G. Ballentyne and Honolulu Rapid Transit & Land Company *vs.* William O. Smith; The Pacific Heights Electric Railway Company, Limited and C. S. Desky. Appeal and Citation. Filed Dec. 7, 1905. George Lucas Clerk. Castle & Withington Attorneys for Appellants.

Due service and the receipt of a copy of the within and foregoing appeal and citation admitted this 7th day of December 1905.

SMITH & LEWIS,
Attorneys for the Appellee, William O. Smith, Trustee.

Service and the receipt of a copy of the within appeal and citation, admitted this 7th day of December, 1905.

THAYER & HEMENWAY,
Attorneys for th Appellees, The Pacific Heights Electric Railway Company, Limited, and C. S. Desky.

106 In the Supreme Court of the United States.

C. G. BALLENTYNE and HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellants,
vs.
WILLIAM O. SMITH, Trustee; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, and C. S. DESKY, Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come the Appellants in the above entitled cause, and say that in the record of the proceedings in the said cause in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

(1) That there was error in overruling the appeal of the Appellants from the order of the Third Judge of the Circuit Court of the First Circuit in the Territory of Hawaii in setting aside the sale of the property of said Pacific Heights Electric Railway Company, Limited to the Appellant C. G. Ballentyne, ordering a new sale and refusing to confirm the sale to said C. G. Ballentyne.

(2) That there was error in holding that in this case in which the only objection to the sale was on the ground of gross inadequacy of price, in which no irregularity was charged or proved, and in which it was admitted that there was no actual fraud or charge of fraud by Mr. Ballentyne or the Rapid Transit Company in this sale,
107 or any person bidding thereat, and no evidence of fraud or mistake or other circumstances other than inadequacy of price on which to set aside the sale; to hold that there was a discretion in the Circuit Judge to set aside said sale, and in affirming his decision setting aside said sale, and refusing to confirm the sale to said C. G. Ballentyne.

(3) That there was error in holding that the fact that the property involved in the sale in this action was worth six or seven times the amount bid was sufficient evidence—with reference to property of a kind and situated as the property herein described is situated—of such gross inadequacy as to authorize the Circuit Judge to set aside the sale.

(4) That there was error in holding that while the discretion of the Circuit Court Judge had been exercised under an erroneous rule laid down by him, viz: that it was his duty to set aside the sale in case the terms were not the best that could be obtained, and more could be realized upon a resale than the amount bid and the cost of a resale, that the purchaser only stood in the position of the one making the best offer, which offer the court could accept or reject in its discretion, yet that the Supreme Court would not interfere with the discretion which had been exercised by the Circuit Judge, under this erroneous view of his discretion.

(5) That there was error in holding that in addition to the inadequacy of price there were any circumstances which could be

taken into consideration in connection with such inadequacy in view if the fact that the objections to the sale in the court below were made purely on the ground of gross inadequacy of price, and on the admission that there was no fraud and no irregularity in the sale, and further, that the circumstances alluded to are not such that the court will consider them or give weight to them in connection with such inadequacy.

108 Wherefore, the said C. G. Ballentyne and the Honolulu Rapid Transit and Land Company pray that the order of said Supreme Court of the Territory of Hawaii be reversed, and the said Supreme Court of the Territory of Hawaii be directed to enter an order reversing the judgment of the said Third Judge of the First Circuit of the Territory of Hawaii, and directing him to confirm said sale to said C. G. Ballentyne.

W. R. CASTLE,
D. L. WITHINGTON,
CASTLE & WITHINGTON,
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109 [Endorsed:] In the Supreme Court of the United States. Appeal from the Supreme Court of the Territory of Hawaii. C. G. Ballentyne and Honolulu Rapid Transit and Land Company, Appellants, *vs.* William O. Smith, Trustee, The Pacific Heights Electric Railway Company, Limited, and C. S. Desky, Appellees. Assignment of Errors. Filed Dec. 7, 1905 George Lucas Clerk Castle & Withington, Attorneys for Appellants.

110 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

WILLIAM O. SMITH, Trustee,
vs.
THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED; HONOLULU RAPID TRANSIT AND LAND COMPANY; C. G. BALLENTYNE and C. S. DESKY.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Appeal, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 109, inclusive, contain a true and complete transcript of the record and proceedings, excepting of the evidence including the assignment of errors and the original appeal and citation on appeal, in said Court in the cause of C. G. Ballentyne and Honolulu Rapid Transit and Land Company, Appellants, against William O. Smith, Trustee, The Pacific Heights Electric Railway Company, Limited and C. S. Desky, Appellees, as the same remain of record and on file in my office as the Clerk of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Honolulu, in the Territory of Hawaii, this 20th day of February in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundredth and twenty-ninth.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20,117. Hawaii Territory, supreme court. Term No. 216. C. G. Ballentyne and Honolulu Rapid Transit and Land Company, appellants, *vs.* William O. Smith, trustee; The Pacific Heights Electric Railway Company, Limited, and C. S. Desky. Filed March 6th, 1906. File No. 20,117.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

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JAMES H. McKENNE

C. G. BALLENTYNE AND HONOLULU RAPID TRANSIT AND LAND COMPANY,

Appellants,

vs.

WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY,

Appellees.

No. 216.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
Attorneys for Appellant.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.

INDEX.

PAGE.

STATEMENT OF THE CASE..... 1

ASSIGNMENT OF ERRORS..... 6

POINTS OF LAW 7

(a) *No discretion to refuse confirmation where no evidence given of the value of the property as a whole, the only evidence being of increased value if sold in a different manner, namely, in separate parcels*..... 7

(b) *Error for Appellate Court to sustain the discretion of the Circuit Judge exercised under an erroneous rule of law.* 7

I. SALE SHOULD HAVE BEEN CONFIRMED AS THERE WAS NO CLAIM OF FRAUD, UNFAIRNESS OR IRREGULARITY..... 8

(a) *The Consciences of Courts not shocked by even greater disparity in value*..... 15

(b) *The rule laid down in Confirmations of Judicial Sales*..... 20

(c) *The rule laid down in other similar cases*..... 23

II. THE DISCRETION BEING LEGAL THE EXERCISE UNDER AN ERRONEOUS RULE OF LAW IS A CLEAR ERROR..... 25

CASES CITED.

A

Ackerman v. Hendricks, 117 Ia. 106:90 N. W. 522..... 23

Allen v. Pierson, 60 Tex. 604..... 18

Alms & Doepke Co. v. Gates, (Ky. 1895) 32 S. W. 1088..... 21

American Insurance Co. v. Oakley, 9 Paige (N. Y.) 259.....26, 27

Anglo-California Bank v. Cerf, 142 Cal. 303:75 Pac. 902..... 24

Ayers v. Baumgarten, 15 Ill. 444..... 26

B

Bank of New Brunswick v. Hassert, 1 N. J. E. 1..... 23

Barling v. Peters, 134 Ill. 606:25 N. E. 765.....23, 24, 28

Benton v. Schreevem, 4 Ind. 69..... 16,

Bethleham Iron Co. v. Philadelphia & S. S. Ry. Co., 49 N. J. E. 356:28 Atl. 1077 .....22, 26

Blossom v. Milwaukee & Chicago R. Co., 1 Wall. 655:17 L. 673..... 26

Bocher v. Louisville, 76 S. W. 18:25 Ky. Law. Rep. 492..... 24

Butler v. Haskell, 4 Des. 651, 697..... 10

Byers v. Surget, 19 How. (U. S.) 303:15 L. 670.....10, 11

C

Cake v. Cake, 156 Pa. St. 47:26 Atl. 781..... 21

Carden v. Lane, 48 Ark. 216:2 S. W. 709..... 19

Cavender v. Smith, 1 Ia. 306..... 24

Central Pac. R. R. Co. v. Creed, 70 Cal. 497..... 24

Chouteau v. Nickolls, 20 Mo. 442..... 23

PAGE.
Comstock v. Purple, 49 Ill. 159.....18, 20
Conway v. John, 14 Colo. 30:23 Pac. 170..... 22
Cooper v. Galbraith, 6 Fed. Cases 3193..... 24
Cooper v. Wilson, 96 Pa. St. 409..... 24
Cowles v. Phoenix Mut. Life Ins. Co., 63 Kan. 883:65 Pac. 217..... 24

D

Dazet v. Landry, 22 Nev. 261:38 Pac. 264..... 20
Dobbins v. Wilson, 107 Ill. 17..... 24
Duncan v. Sanders, 50 Ill. 475.....21, 24

F

Farmers' Loan & Trust Co. (Ex Parte), 129 U. S. 206:32 L. 656..... 26
Felton v. Felton, 175 Pa. St. 44:34 Atl. 312..... 21
Fidelity Insurance Trust Co. v. Roanoke St. Ry. Co., 98 Fed. 475..... 23
Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 54 Fed. 26.... 23
Fidelity &c., Co., v. Roanoke Iron Co., 84 Fed. 752..... 20
Files v. Brown, 124 Fed. 133..... 20
First Nat. Bank of Deadwood v. Black Hill Fair Ass'n, 2 S. Dak. 145:48 N. W. 852..... 22

G

Ganst v. Moss, 20 Ill. 549..... 18
Gibbons v. Bressler, 61 Ill. 110..... 23
Glennon v. Mittenight, 86 Ala. 455:5 So. 772..... 22
Graffam v. Burgess, 117 U. S. 180:29 L. 839.....10, 11, 12, 14
Griffith v. Milwaukee Harvester Co., 92 Ia. 632:61 N. W. 243:54 Am. St. Rep. 572..... 19

H

Hays v. Steiger, 29 N. J. E. (2 Hew.) 196..... 28
Herden v. Trustees College Bible (Ky. 1898) 20 Ky. Laws Rep. 30:45 S. W. 67..... 23
Hollister v. Vanderlin, 165 Pa. St. 248:30 Atl. 1002..... 21
Holmes v. Fresh, 9 Mo. 201..... 17
Homerfeldt v. Zellers, 7 N. J. L. 156..... 23
Hullerton v. Seiper, (N. J. E.) 34 Atl. 680..... 16

I

Ison v. Kinnaird, (Ky. 1891) 17 S. W. 633..... 21

J

Johnson v. Dorsey, 7 Gill. (Md.) 269..... 28
Jones v. Pratt, 77 Tex. 210:13 S. W. 887..... 18

K

Kearney v. Boeckeler, 143 Mo. 60:44 S. W. 721..... 17
Kerr v. Haverstick, 94 Ind. 178..... 15
Koch v. West, 118 Ia. 468:92 N. W. 663:96 Am. St. Rep. 394..... 24
Konic v. Hill, 127 Cal. 162:59 Pac. 832..... 24

L

PAGE.

Lennon v. Heindel, 56 N. J. E. 8:37 Atl. 149..... 23
Littell v. Zuntz, 2 Ala. 256:36 Am. Dec. 415..... 22

M

Magann v. Segal, 92 Fed. 252.....20, 23
Mason v. Jackson, (Tenn. 1900) 57 S. W. 217..... 18
McDonnell v. De Soto Sav. &c. Ass'n, 175 Mo. 250:75 S. W. 438; 97 Am. St. Rep. 592..... 17
McGeorge v. Lease, 37 Kan, 387:4 Pac. 846..... 22
McMullen v. Gable, 47 Ill. 67..... 23
Mead v. Munroe, 113 Pa. St. 220:8 Atl. 374..... 24
Means v. Rosevear, 42 Kan. 377:22 Pac. 319..... 22
Media Title & Trust Co. v. Kelly, 185 Pa. St. 131:39 Atl. 832..... 24
Meir v. Zelle, 31 Mo. 331..... 23
Mercereau v. Prest, 3 N. J. E. 460..... 23
Moore v. Triplett, 96 Va. 603:32 S. E. 50:70 Am. St. Rep. 882..... 27
Morrisse v. Inglis, 46 N. J. E. 306:19 Atl. 16.....23, 26

N

Nix v. Dragan, 56 Ark. 240:19 S. W. 669..... 21
Noyes v. Grue, 23 Ill. 450..... 23

O

Osgoode v. Franklin, 2 John. Ch. (N. Y.) 123..... 22
Owens v. Owens (Ky. 1899) 52 S. W. 822..... 21

P

Palmour v. Roper, et al., 119 Ga. 10:45 S. E. 790.....18, 24, 27
Parker v. Hannibal, 44 Mo. 415..... 23
Passmore v. Moore, (Ky. 1893) 22 S. W. 325..... 21
Peterson v. Little, 74 Ia. 223:37 N. W. 169..... 19
Pewabic Mining Co. v. Mason, 145 U. S. 349:36 L. 732.....23, 26, 27
Pickering v. Griggers, 59 Ill. 65..... 23

Q

Quigley v. Breckinbridge, 180 Ill. 627:52 N. E. 580.....23, 24, 26, 28

R

Robb v. Hannah's Executor, (Ky. 1890) 14 S. W. 360..... 21
Rogers Company v. Cleveland Co., 132 Mo. 442:32 S. W. 1:34 S. W. 57:53 Am. St. Rep 494..... 16

S

Schroder v. Young, 161 U. S. 334:40 L. 721..... 12
Simmons v. Vandergrift, 1 N. J. E. 55..... 23
Sheppard v. Messenger, 107 Ia. 717:77 N. W. 515..... 19
Smith v. Duncan, 16 N. J. E. 240..... 16
Smith v. Huntoon, 134 Ill. 24:24 N. E. 971:23 Am. St. Rep. 646..... 24
Smith v. Perkins, 81 Tex. 152:26 Am. St. Rep 794..... 17

PAGE.

Smith v. Randall, 6 Cal. 47:65 Am. Dec. 475..... 24
Smith v. S. S. City of Columbia, 11 Haw. 709..... 9
Sowles v. Harvey, 20 Ind. 217:83 Am. Dec. 315..... 15
Summerville v. March, 142 Cal. 554:76 Pac. 389:100 Am. St. Rep. 145 and note 24
Stroup v. Raymond, 183 Pa. St. 279:36 Atl. 626:63 Am. St. Rep 758.. ..... 19, 21, 27

T

Terry v. Swinford, (Ky. 1897) 41 S. W. 553..... 21
Thompson v. Ritchie, 80 Md. 270:30 Atl. 708..... 21

W

Wallace v. Berger, 25 Ia. 436..... 19
Wall v. McGalliard, 67 Ill. 519..... 18
Weber v. Weitling, 18 N. J. E. 441..... 16
Weaver v. Nugent, 72 Tex. 272:10 S. W. 458:13 Am. St. Rep. 792.... 17
Williamson v. Dale, 3 Johns. Ch. (N. Y.) 290..... 22
Williams v. Johnson, 112 N. C. 424:17 S. E. 496:34 Am. St. Rep. 513.. 24
Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614..... 27
Wood v. Young, 38 Ia. 102..... 19

Y

Young v. Teague, 1 Bailey Eq. (S. C. 1830)..... 28

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

C. G. BALLENTYNE AND HONOLULU RAPID TRANSIT AND LAND COMPANY,
Appellants,

vs.

WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY,
Appellees.

No. 216.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from an order of the Supreme Court of the Territory of Hawaii, affirming an order of the third judge of the Circuit Court of the First Circuit in the Territory of Hawaii, setting aside a sale of the property of the Pacific Heights Electric Railway Company made by a commissioner under order of Court in a foreclosure suit brought by William O. Smith, as Trustee, against the Pacific Heights Electric Railway Company, Limited, a Hawaiian corporation; August Dreier, Honolulu Rapid Transit and Land Company, Limited, a Hawaiian corporation; Sister Albertina, Trustee, and Charles S. Desky.

The action was brought to foreclose a mortgage of Fifty

Thousand Dollars ($50,000) given by the Pacific Heights Electric Railway Company, Limited, to William O. Smith as Trustee, on the first day of April, 1902, and duly recorded in the Registry of Conveyances in Honolulu, purporting to convey an electric railway two and a half miles in length running up Pacific Heights with the equipment of every kind appertinent to said railroad, and all land and other property conveyed by deed of Charles S. Desky dated January 25th, 1902, (the Deed of Trust is Exhibit "A" attached to the bill of foreclosure). (Tr. pp. 11-21.) Desky's deed is Exhibit "B," (Tr. pp. 21-23). The Trust Deed provided (Tr. p. 17) that on default the Trustee might, in his discretion, sell to the highest bidder all and singular the said railway's property and effects upon proper notice therein provided, and for the completion of said sale to execute and deliver to the purchaser good and sufficient conveyances, which conveyances shall forever bar and foreclose any equity of redemption existing in favor of said Company; it is further provided that any sale whether under the power or by virtue of judicial proceedings shall operate to divest all right, title, interest or estate either in law or equity of said company in and to the property sold, and that the receipt of the Trustee shall be a discharge of the purchaser from any obligation to see to the application of the purchase money or to the authority of the sale.

In the bill is alleged the issue of the bonds of One Thousand Dollars each, that forty were owned by Cecil Brown, Trustee, and ten by F. M. Hatch, the default and demand by the bondholders to foreclose. That the trustee had taken possession of the property and found the railway was not safe for operation; that it would cost the sum of Fifty-five Hundred Dollars to repair; that the company was without any means to repair and the Trustee thereupon brought the present proceeding.

Further allegations show the claims of different parties to property said to be owned by the Company, and also that the title to some of the property transferred had been foreclosed.

The prayer of the petitioner is that the Trustee be directed to sell and apply the proceeds to the bonds, for a deficiency judg-

ment, and that the petitioner be allowed and directed to make deeds upon such sale (Tr. pp. 1-10).

The complaint was filed on the 10th of September, 1904, and on the 31st day of December, 1904, a decree was entered (Tr. pp. 28-35) ordering the sale of all the property and appointing M. T. Simonton, as commissioner, instead of authorizing the Trustee as prayed for in the complaint, and directing the sale to be at public auction after due notice, "said commissioner to make out a full return to this Court for its approval and confirmation within ninety days from the date of this decree." The decree further provides that on making a sale, the commissioner should execute deeds requiring no further order of the Court to let the purchaser into possession. The decree provided that all the other property should be sold first, a steam condenser second, and a cable third, the condenser and cable not to be sold unless all the other property should prove insufficient to pay the sum due (Tr. p. 35). On February 8th, 1905, the commissioner made return (Tr. pp. 36-38) showing that he had duly advertised said sale by advertisement and by posters, and that pursuant to said notice he had sold all of the property excepting the steam condenser first, and the steam condenser second.

"That at such sale C. G. Ballentyne, Esq., became the purchaser of the property first sold as aforesaid, for the sum of $1,100.00.

"That said August Dreier, Esq., became the purchaser of the steam condenser so sold as aforesaid, for the sum of $100.00.

"That the said C. G. Ballentyne, Esq., and the said August Dreier, Esq., were the highest and best bidders respectively, and the respective sums above specified were the highest and best sums bid for the respective property so offered and sold as aforesaid.

"That the undersigned is informed and believes and so states the fact to be that the respective sums bid and the amounts realized at such sale are and each of them is disproportionate to the value of the property so sold as aforesaid.

"Wherefore, your Commissioner submits that said sale should not be confirmed, but that such further order should be made as to the Court may seem meet in the premises."

On the 13th day of February, 1905, William O. Smith, Trustee and Petitioner, protested and objected against the confirmation of both sales and asked for a re-sale. (Tr. pp. 44-45.)

"And the said William O. Smith, Trustee, as aforesaid represents, as the ground for his objection and protest herein, that the highest and best sums bid for the properties, respectively, at said sale in said Commissioner's report mentioned as held on February 4th, 1905, were and are grossly inadequate, insufficient and disproportionate to the real and reasonable values of the properties offered at said sale, respectively, and to the prices which may in fact be had and obtained; and the further ground that a confirmation of said sales made on said 4th day of February, 1905, for the prices then and there offered, respectively, would be unjust and unfair to the Petitioner in this cause and to all the parties hereto.

"And in support of said objections the said William O. Smith, Trustee as aforesaid, prays leave to adduce before this Court, at the hearing of said Commissioner's report and proceedings had in connection therewith, the sworn testimony of witnesses with respect to the real and true values of the property by said decree directed to be sold; said objections being further based upon all the papers, records, and files in said cause, to all of which reference is hereby made and the same made part hereof."

And on the same date the Pacific Heights Railway Company, Limited, by Charles S. Desky, its President, and Charles S. Desky, made a similar motion on the ground:

"That the highest prices bid at said sales for the properties offered, respectively, are altogether disproportionate to the true values of said properties and to the prices which may be obtained upon a re-sale thereof under proper terms and conditions, and are grossly inadequate and unreasonable." (Tr. p. 46.)

The motion also asked that on a re-sale the property be sold in lots and parcels. On the following day, February 14th, 1905, C. G. Ballentyne moved to confirm the sale (Tr. p. 44).

On April 10th, 1905, the third judge of the First Circuit confirmed the sale made to Dreier and set aside the sale made to C. G. Ballentyne, on the ground that the evidence showed as to the latter property that it was worth seven times the amount for which it was sold. The Court arrived at this conclusion by finding the values of the separate parts, there being no evidence

of the actual value of the property as a whole, holding that in the case of a judicial sale the commissioner appointed by the decree was a mere agent of the Court and not a ministerial officer acting in the discharge of a duty imposed upon him by law, and that upon the judicial sale no bidder acquired any interest in the property, and that the confirmation or disaffirmance of a sale is a matter of judicial discretion.

"If it appears to the satisfaction of the Court upon due proof, that the price or sum bid is disproportionate to the value of the property offered for sale to such an extent that upon a re-sale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale—can be obtained it is the duty of the Court to order a re-sale, and a failure on the part of the Court to discharge its duty in this particular, would, on appeal, constitute reversible error." (Tr. p. 49.)

The Court further ordered, as it was the wish of the parties that in the event of re-sale, the property be sold in lots and parcels.

From this order the Honolulu Rapid Transit and Land Company and C. G. Ballentyne appealed to the Supreme Court of Hawaii, (Tr. p. 51,) which Court affirmed the order on the 3rd day of October, 1905. The Court in its opinion (Tr. pp. 52-59) referred to the fact that the property was claimed to have cost $78,000.00, exclusive of the right of way, and was bonded for $50,000.00, recites that the Circuit Judge in affirming the sale and ordering a new sale, had expressed the opinion that a "judicial sale could be set aside in the discretion of the court for mere inadequacy of price and, indeed, that it was the duty of the Court to order a re-sale if it appeared that the price obtained was inadequate to such an extent that upon a re-sale a price could be obtained sufficiently greater to more than cover the expenses of the new sale." (Tr. p. 52.) The Court expresses no opinion on this rule of law, but proceeds to say that the principle question is one of law as to what weight should be given to inadequacy of price when relied on as a ground for setting aside a judicial sale and holds that the rule best sustained by reason and authority is that although mere inadequacy is insufficient unless accompanied by other circumstances, inadequacy so gross

as to shock the conscience or imply unfairness in the sale is sufficient for setting aside the sale before confirmation. If the inadequacy is not gross it should be accompanied by other circumstances. After referring to many authorities to sustain this rule and discussing the case of *Smith v. S. S. City of Columbia,* 11 Hawaii 709, holding that by the language in that case that the inadequacy must be such as to "shock the conscience and to be presumptive evidence of fraud," the Court did not intend as being two different or unconnected things that must unite in order to warrant setting aside the sale.

The Court concludes that no inflexible rule can be laid down in all cases, that more would be required in a judicial sale like the one at bar for the foreclosure of a mortgage than for setting aside a sale where the main object was simply to sell the property for a change of investment. "The main idea is on one hand to maintain the stability of judicial sales and not deter bidders by rendering such sales liable to be set aside for trivial reasons and on the other hand to protect interested parties and not unduly sacrifice their property."

Proceeding the Court says that it is unnecessary to consider whether there were any other circumstances than inadequacy of price in the present case, since although the decision of the trial judge is reviewable, it should not be reversed unless clearly erroneous, and that as considerable weight should be given to the opinion of the trial judge the order should be affirmed.

From this order the appellants have appealed to this Court.

ERRORS ASSIGNED.

Omitting the first and fifth assignment of errors, which are included in the errors herein set forth, the complainants rely upon the following assignment of errors, which clearly set forth the grounds on which the complainants ask that the judgment be reversed.

"(2) That there was error in holding that in this case in which the only objection to the sale was on the ground of gross inadequacy of price, in which no irregularity was charged or proved, and in which it was admitted that there was no actual fraud by Mr. Ballentyne or the Rapid Transit Company in this

sale, or any person bidding thereat, and no evidence of fraud or mistake or other circumstances other than inadequacy of price on which to set aside the sale; to hold that there was a discretion in the Circuit Judge to set aside said sale, and in affirming his decision setting aside said sale, and refusing to confirm the sale to said C. G. Ballentyne.

"(3) That there was error in holding that the fact that the property involved in the sale in this action was worth six or seven times the amount bid was sufficient evidence—with reference to property of a kind and situated as the property herein described is situated—of such gross inadequacy as to authorize the Circuit Judge to set aside the sale.

"(4) That there was error in holding that while the discretion of the Circuit Court Judge had been exercised under an erroneous rule laid down by him, viz: that it was his duty to set aside the sale in case the terms were not the best that could be obtained, and more could be realized upon a re-sale than the amount bid and the cost of a re-sale, that the purchaser only stood in the position of the one making the best offer, which offer the Court could accept or reject in its discretion, yet that the Supreme Court could not interfere with the discretion which had been exercised by the Circuit Judge, under this erroneous view of his discretion." (Tr. p. 61.)

POINTS OF LAW.

The questions which are presented in this case are very simple and clearly raised on the record. They are: (a) Whether there is any discretion in the Circuit Judge to refuse to confirm a sale of property of this kind where there is no evidence of its value, but where there is evidence that if the sale had been made separately six or seven times as much would have been realized, and where no objection is made on any other ground excepting that the price obtained is inadequate and:

(b) Whether it was error for the Supreme Court to sustain the sale on the ground that they would not interfere with the discretion of the Circuit Court when the record shows that that discretion was exercised under an erroneous view of the law, namely, that it was the duty of the Circuit Court to set aside the sale, when more could be realized upon a re-sale than the amount bid and the cost of a re-sale, and that the purchaser only

stood in the position of the one making the best offer, which offer the Court could either accept or reject in its discretion.

We think the mere statement in (b) is sufficient to demand reversal.

I.

THE SALE SHOULD HAVE BEEN CONFIRMED. IT WAS REGULARLY CONDUCTED AND NO FRAUD, UNFAIRNESS OR IRREGULARITY OF ANY KIND IS ALLEGED.

The only ground set forth in the objection is "that the highest and best sum bid for the properties, respectively, at said sale in said commissioner's report mentioned as held on February 4th, 1905, were and are grossly inadequate, insufficient and disproportionate to the real and reasonable values of the properties offered at the said sale, respectively, and to the prices which may be had and obtained; and the further ground that a confirmation of said sales made on said 4th of February, 1905, for the price then and there offered, respectively, would be unjust and unfair to the petitioner in this cause and to all the parties hereto." (Tr. p. 45.)

The only ground alleged is that the price is disproportionate to the real value and to prices which might be obtained. The unfairness alleged is unfairness on this ground, not any unfairness in the proceeding. And the Trustee offers to produce at the hearing simply "witnesses as to the real and true value of the property" while the defendant asks a re-sale simply to have the property sold in separate parts and parcels.

The single question presented under this head is whether inadequacy of price uncoupled with any irregularity and by any circumstances indicating either fraud or unfairness, where it is not claimed that the inadequacy of price is evidence of fraud or unfairness, will authorize the Court to set aside the sale.

Before the decision in this case by the Court below the point had been settled in Hawaii in a very similar case cited and approved by the Court in its opinion, in which although the Court found that the cost of repairing, would be greater than

the value of the vessel repaired (which is the case of this railroad), it declined to consider it as a wrecking proposition, which is a pure matter of conjunction (which is this case) and after holding that the purpose of confirmation was to determine whether the sale was "fairly and properly conducted." The Court affirmed the rule:

"There is but little doubt that the general rule governing the confirmation of a judicial sale is that the sale, if regular will be confirmed unless the price obtained is so grossly inadequate to the value of the property sold as to shock the conscience of the court, and be presumptive evidence of fraud."

Smith v. City of Columbia, 11 Haw. 709.

Nor is this rule disavowed by the Hawaiian court in the present case. It says in discussing the citation above quoted:

"It is true the Court used the expressions 'shock the conscience' and 'be presumptive evidence of fraud' in the conjunctive, although similar expressions when coupled in other cases and in the text books are generally stated in the disjunctive, and yet it is clear that the court did not intend these as being two different or unconnected things which must unite in order to warrant setting aside a sale. Not only is the word 'fraud' used in expressions of this kind in a general sense as including surprise, accident, mistake, irregularity, etc., as well as fraud, misrepresentation, misconduct, etc., but it is the grossness of the inadequacy which implies the fraud or unfairness, and it is sufficient if the inadequacy is so great as to imply that, even though it does not suggest the nature of the fraud and there is nothing else to show in what it consisted. As stated in one of the quotations above made, it is sufficient if the grossness of the inadequacy is such as to afford substantial evidence that for some perhaps unknown reason the property has been greatly undersold." (Tr. p. 57.)

In other words, the grossness of the inadequacy must imply fraud or unfairness even though it does not suggest the nature of the fraud, but here the cause alleged is that the property as it turns out would have brought more if sold in parcels, which shows a mere error of judgment.

In a leading case upon this subject Mr. Justice Bradley said, after citing Lord Eldon's opinion, that the practice of opening biddings upon the mere offer of an advanced price tended to diminish confidence in the sale, to keep bidders from attending

and to diminish the amount realized, and calling attention to the fact the Lord Eldon's views had been adopted in England by act of Parliament and in this country by a long line of authorities, which are cited, continues:

"From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

Graffam v. Burgess, 117 U. S. 180: 29 L. ed. 839.

After calling particular attention to four cases, in one where the sale took place on a stormy day and no one was present but the purchaser and the sheriff, in another the owner was ignorant, stupid and preverse and misunderstood the circumstances of the sale; in another in this Court where 14,000 acres of land worth from $40,000 to $70,000 were sold to the attorney for the plaintiff for $9.13½ in which the Court found that the purchaser had shown conduct of an irregular and extraordinary character which in connection with the gross inadequacy of consideration irresistably compelled the conclusion that the sale and purchase of the land were a malicious design on his part to deprive the owner of his property. *(Byers v. Surget*, 19 Howard 303: 15 L. ed. 670.) And a Massachusetts case in which in addition to the inadequacy it appeared that the mortgagee in making the sale had acted in bad faith to the mortgagor, the Court continued:

"Mr. Kerr, in his Treatise on Fraud and Mistake, says: 'Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction.' Kerr Fraud, Am. ed. 186. Chancellor Desaussure, in the case of *Butler v. Haskell*, 4 Des. 651, 697, on the same subject says: 'I consider the result of the great body of the cases to be, that wherever the Court preceives that a sale of property has been made at a grossly inade-

quate price, such as would shock a correct mind, this inadequacy furnishes a strong and in general a conclusive presumption, though there is no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct.' "

Graffam v. Burgess, ubi supra.

In this case Justices Miller, Wood, Mathews and Gray dissented on the ground that it would lead to evil results by discrediting judicial sales, chiefly on the ground that the action to set aside the sale was brought after the period of redemption was passed, although the Court found that a part of the scheme was to keep the judgment debtor ignorant of the sale and that she was unconscious of her position.

We strenuously insist that this case when examined is only authority to the point that gross inadequacy of price coupled with other circumstances indicating unfair practices is evidence of fraud. The case was decided largely on the authority of the earlier case in which the court said:

"To meet the objection of the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualifications annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience: for this qualification implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud."

Byers v. Surget, ubi supra.

Byers v. Surget and *Graffam v. Burgess* are reviewed by Mr. Justice Brown in a more recent case recognizing the rule that other circumstances than mere inadequacy of price are generally necessary, who says:

"While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a case for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, and if several

lots have been sold in a bulk where they should have been sold separately, or sold in a manner that their full value could be recognized: if the bidders had been kept away: if any undue advantage has been taken to the prejudice of the owner of the property, or if he has been lulled into false security: or if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price—the sale may be set aside, and the owner may be permitted to redeem."

Schroder v. Young, 161 U. S. 334: 40 L. ed. 721.

Many cases cited in the notes to this case in the Lawyers' Edition sustain the proposition that gross inadequacy of itself is not sufficient.

It will be observed that none of the circumstances suggested by Mr. Justice Brown are involved in this case. To sustain the judgment of the court mere inadequacy of price alone must furnish the ground.

Nearly all the cases are reviewed by Mr. Freeman in his work on Executions, in discussing the conclusions of the Supreme Court of the United States in the case of *Graffam v. Burgess*, 117 U. S. 192, he says:

"From the conclusion thus announced, that when there is a great inadequacy of price, confirmation will be refused in any circumstances of irregularity or unfairness shown to have preceded or attended the sale, there is no dissent. To say, however, that such refusal must be justified, 'if the inadequacy is so gross as to shock the conscience,' is, in effect, to affirm that inadequacy may, in every instance, be a sufficient ground for refusing a confirmation, if it shock the conscience of the judge to whose consideration it is presented. We think the decided weight of authority in the United States does not sustain this conclusion, and that, on the contrary, it asserts that where there is no irregularity or unfairness, or in other words, nothing but inadequacy, urged as a ground for refusing confirmation, it must fail, though the inadequacy be very clearly established and be so great that it may be characterized as gross."

Freeman on Executions, section 304i.

We respectfully urge that the rule announced by Mr. Freeman is the correct rule; that mere inadequacy of price is not sufficient to set the sale aside, for to say that if it is so gross as to

shock the conscience is to leave it to the conscience of each chancellor or in other words to the idea of each individual judge of what is gross and what should or does shock his conscience. It is incredible that so important a question as whether stability shall be given to a judicial sale should be left to a rule which would vary with every individual judge.

Nor is mere inadequacy apart from the circumstances of the case of itself, however gross it may be, evidence of irregularity or unfairness. It is only in connection with the circumstances of the case which of themselves might not be sufficient to evidence fraud, irregularity or unfairness that the Court may, because of the grossness of the inequality, infer fraud, irregularity or unfairness.

In the present case, however, there is no allegation or contention that there was fraud, irregularity or unfairness, or that the inadequacy evidenced any of these. The only ground on which the sale is sought to be set aside is, and the Circuit Judge with perfect frankness announced the only rule on which this judgment can be sustained as:

"If it appears to the satisfaction of the Court, upon due proof, that the price or sum bid is disproportunate to the value of the property offered for sale to such an extent that upon a re-sale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale—can be obtained, it is the duty of the Court to order a re-sale, and a failure of the Court to discharge its duty in this particular would, on appeal, constitute reversible error. It is the duty of a Court of equity, in all cases before it, and especially in a suit to enforce and foreclose a lien upon specific property to see to it that the rights and interests of all parties in interest are conserved and protected, and it would be unconscionable to adopt an arbitrary rule for the guidance of a court of good conscience and of equal, exact and substantial justice, which would tie its hands and defeat the chief purpose of its creation and existence.

"I am satisfied, in the case at bar, that the price or sum bid at the commissioner's sale for the property first described in the decree, is grossly inadequate and disproportionate to the value of the property offered for sale and that an amount vastly in excess of the price or sum bid, exclusive of the expenses of a new sale, can be obtained on a re-sale thereof. As it is the wish

of the parties, expressed in open Court, that in the event of a re-sale of the property first described in the decree, that the same should be sold in lots and parcels and not as a whole, and as the evidence tends to show that a greater price could be obtained for said property if sold in lots and parcels, in my judgment it would be for the best interests of all parties concerned that upon a re-sale said property should be sold in lots and parcels and not as a whole." (Tr. pp. 49-50.)

In other words, this case must stand or fall upon the simple proposition that where property which was sold as a whole would, in the opinion of the Court, bring six or seven times as much if it were sold in parcels, the sale as a whole should be set aside, although there was no fraud, irregularity or unfairness in the sale itself, because a mistake in judgment had been made in which all parties but the purchasers participated.

We will at the risk of burdening the Court cite a large number of cases in which the fundamental proposition for which we contend is laid down and applied. We shall not only deal with judicial sales pure and simple but with those cases which arise under sales on execution and other similar sales where the rule has been applied, because an examination of authorities will show, as was the case in *Graffam v. Burgess, ubi supra*, that no radical distinction is made in applying the rules, this is recognized by the Court of Hawaii in its opinion and our contention in effect maintained, the Court holding that the main object is to maintain the stability of the sale and not to deter bidders, but holding what is undoubtedly true, that more might be required after confirmation than before, or in the case of an execution sale where there was a right of redemption, after that right had expired, then a case like the case at bar. But the question involved in the proposition we are now discussing is not the amount or weight of the evidence but whether under the rules of law the sale can be set aside at all for mere inadequacy of price. To this the rule announced in one class as well as in another is equally applicable.

While it may not be in strict logical order we shall take up these cases under an artificial division showing that the consciences of judges have not been shocked by prices of similar or

even much greater inadequacy; that the rule has been applied in numerous cases where, as in this case, the question arose directly on the confirmation of a judicial sale, and finally citing the larger number in which in sales of similar character whether on execution or otherwise and whether the question has arisen on a bill in equity to set aside or upon some motion, the principle has been laid down, and from these we shall finally conclude that the true rule after all is that there must be some equitable reason outside of mere inadequacy to set aside the sale, and that if the inadequacy alone can be taken as sufficient evidence of fraud, unfairness or irregularity, it can only be in cases where the amount realized from the sale is nominal and where the purchaser is getting something for nothing which is not this case.

(a) Cases in which the conscience of the chancellor has not been shocked by similar or even greater disparity than in the case at bar.

An equity worth $2400.00 sold for $5.00, sale will not be set aside on the ground of inadequacy of price.

Kerr v. Haverstick, 94 Ind. 178.

Also where property worth $600.00 for $165.00.

Sowles v. Harvey, 20 Ind. 217, 83 Am. Dec. 315.

We cite also an Indiana case in which the price was about one twenty-fourth part of the full value of the lot, in which the court said:

"The rule that a sale will be set aside for gross inadequacy of price, applies only to private sales and not the sales at public auction, Freem. 441. So in *Livingston v. Byrne,* the Court of Errors held unanimously that inadequacy of price was not sufficient to invalidate a judicial sale, unless there be additional circumstances to justify it. And that decision is placed on the authority of Lord Elden in *White v. Damon,* 7 Ves. Jr. 30-34. See also accordingly 3—Hay 1 Speer Chan, 361—2 Green's Chan. 460.

"The rule to be deduced from these authorities as applicable to this case, is, that gross inadequacy of price is not sufficient of itself, to set aside a judicial sale like that to Benton, but

that such inadequacy may be a controlling element in connection with other circumstances."

Benton v. Schreeve, 4 Ind. 69.

Where land worth from $2500.00 to $2800.00, with an incumbrance of $1500.00, was sold under execution for $25.00, the inadequacy of price is insufficient ground on which to base a decree, setting the sale aside as fraudulent.

Hullerton v. Seiper, 34 Atl. 680 (N. J. Eq.).

A bid of $100.00 at a fair public sale, for property worth $1500.00, but upon which there were liens, amounting to $800.00, there being no pretense of fraud, held not to be so grossly inadequate as to set aside the deed.

Weber v. Weitling, 18 N. J. Eq. 441.

Gross inadequacy of price in the absence of fraud, mistakes, illegality, or surprise, is not sufficient to set aside a sheriff's sale and conveyance under an execution at law.

The property was struck off for $25.00, and was sold immediately afterwards for $1500.00. Bill to set aside the sale dismissed.

Smith v. Duncan, 16 N. J. Eq. 240.

Thus where a sale of property worth forty to fifty thousand dollars was sold for $250.00, it was set aside not on the ground of inadequacy of price, but because the description of the property was imperfect and the parties were misled in respect to the sale, and the purchaser was attorney for the plaintiff and not an innocent purchaser.

Rogers Company v. Cleveland Company, (sale affirmed in Department, 32 S. W. 1, 34 S. W. 57), 132 Mo. 442, 53 Am. St. Rep. 494.

Where property of the value of $55,000.00 was sold for $13,100.00, the court says:

"There is no merit in the contention of plaintiffs that the sale of the property should be set aside upon the ground of inadequacy of price. It is a well established rule in equity that mere inadequacy of price, in the absence of other considerations, is no ground for setting a sale aside, unless it be so great and unconsceivable as to shock the moral sense.

"Bispham in Principles of Equity, sixth edition, section 219, says:

"Originally inadequacy of consideration will not be sufficient to set a bargain sale aside, or to justify a refusal to enforce its specific performance. Where, however, the inadequacy is so great as to 'shock the conscience' (which is the phrase usually employed) contracts may be rescinded. * * * A case, therefore, of fraud from inadequacy of consideration, pure and simple, and unmixed with any other kind of fraud, is of very rare occurrence. Nevertheless the rule must be considered as well settled, although rather by dicta than by decisions, that a transaction will be set aside if there is 'an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.' The relief, however, in such cases is granted (it is said) not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby. *Holmes v. Fresh*, 9 Mo. 201. The doctrine thus announced is the well-settled law of this state."

McDonnell v. De Soto Sav., Etc., Assn., 175 Mo. 250, 75 S. W. 438: 97 Am. St. Rep. 592.

Petition to have sale of property for $185.00 set aside because property was worth $12,000, held not to state a cause of action.

See *Kearney v. Boeckeler*, 143 Mo. 60, 44 S. W. 721.

In Texas where land worth $3000 to $6000 sold for $10 it is said:

"The price must be utterly insignificant and shockingly disportionate to the value of the property so that the court cannot regard it in conscience as any consideration whatever, and the mere fact of attempting to hold the property is conclusive evidence of fraud."

Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792.

Smith v. Perkins, 81 Tex. 152, 26 Am. St. Rep. 794.

At a sheriff's sale upon an execution for costs against a plaintiff in a suit to recover a tract of land, the land in controversy was sold for $55.00, it was worth $1200.00. In a suit to set aside the sale held:

"That the inadequacy of price alone was not ground to avoid the sale."

Jones v. Pratt, 77 Texas 210, 13 S. W. 887.

In a case where property worth from $400.00 to $2000.00 sold for $61.00:

"Mere irregularity in making a judicial sale, when taken in connection with gross inadequacy of consideration, will not alone, as matter of law, be held a sufficient ground for vacating such a sale, in the absence of facts showing that the irregularity conduced to the inadequacy of the sum bid."

Allen v. Pierson, 60 Texas 604.

Reversionary interest in estate worth $800.00 sold for $3.05 held mere inadequacy of price not sufficient to invalidate a sale where no trust relation exists.

Mason v. Jackson (Tenn.) 1900, 57 S. W. 217.

Under the Georgia Code, §2647 and §2742, held, where property worth $25,000, if sold separately, sold for $5250 en masse.

Inadequacy of price, though gross, will not be sufficient to set aside a sale unless coupled with other circumstances sufficient to give rise to a presumption of fraud.

Palmour v. Roper et al., 119 Ga. 10: 45 S. E. 790.

A sale of property worth $3500.00 for $384.70, will not be set aside.

Wall v. McGalliard, 67 Ill. 519.

So where property was sold for $14.59 an acre, estimated by witnesses at the value from $20.00 to $125.00 per acre, an order setting aside the sale was reversed.

Ganst v. Moss, 20 Ill. 549.

So land worth $50.00 an acre sold for $15.00.

Comstock v. Purple, 49 Ill. 159.

In Iowa in spite of the decision hereafter referred to, in reference to confirmation, authorizing the court to set aside a sale where a larger price can be realized the conscience of the court has not been shocked in case where execution sales have been sought to set aside for great disparity.

Where property worth $2500.00 was sold for $169.20 it will not be set aside for inadequacy; for it is well settled that mere inadequacy, where no fraud in the sale has been shown, is not sufficient.

Griffith v. Milwaukee Harvester Co., 92 Ia. 632, 61 N. W. 243, 54 Am. St. Rep. 572.

So where property worth more than $2000 was sold for $36.75 it was held that although the price was nominal the sale could not be set aside for inadequacy.

Sheppard v. Messenger, 107 Ia. 717: 77 N. W. 515.

Where land is shown to be worth $400.00 and is sold for $60.00, subject to a mortgage of $100.00 and accrued interest, the price is not so inadequate as to justify the court in setting aside the sale.

Wood v. Young, 38 Iowa 102.

Land valued at $1600.00 sold for $261.00 and sale held not invalid of the ground of gross inadequacy.

Wallace v. Berger, 25 Iowa 456.

Thus where property was sold for $1500.00 subject to a mortgage which left $700.00 of value and the bid was $55.25 the Supreme Court reversed the court below in setting aside the sale holding that gross inadequacy of price not sufficient to avoid a judicial sale.

Peterson v. Little, 74 Ia. 223, 37 N. W. 169.

Where property worth $2500.00 was sold for $400.00 the court will not set it aside for mere inadequacy of price. If set aside the appellate court could reverse it as an abuse of discretion.

Stroup v. Raymond, 183 Pa. St. 279, 36 Atl. 626, 63 Am. St. Rep. 758.

So where a saw-mill and fixtures worth between four and five thousand dollars were sold for $50.00, it was held that to set aside the purchaser must be responsible for the inadequacy and the sale was confirmed.

Carden v. Lane, 48 Ark. 216, 2 S. W. 709.

So where property valued at $534,546.21 was sold for $57,700.00, the court refused to set aside the sale and confirmed it, citing—2 Beach Mod. Eq. Pr., sec. 821: "To justify the interference of the court, there must be fraud, mistake, or some accident by which the rights of the parties have been affected. It has never been decided that mere inadequacy of price was a sufficient reason, of itself, to open a sale. Id. sec. 824."

Fidelity, Etc., Co. v. Roanoke Iron Co., 84 Fed. 752.

This case was followed by one where property which cost $2,000,000 was sold for $160.00.

Magann v. Segal, 92 Fed. 252.

"The old chancery rule has been abolished in England and never existed in this country."

In this case the court refused to set aside a sale of collateral for $25.00 where it turned out that it was worth $3200.00 on the ground of inadequacy of price, justifying this partly on the ground that the $3200.00 was to be realized in the future, and that under all the circumstances it was not such as to come within the rule authorizing it aside while it shocked the conscience of the court.

Files v. Brown, 124 Fed. 133.

(b) Cases in which the rule has been applied directly to the confirmation of judicial sales.

Thus, although there are cases which hold, as is suggested by the Court of Hawaii, that a less rigid rule would be applied where the proceeding is one merely to change the character of the investment or to convert real property into personal property, yet even in these cases it has been held that in a partition proceeding that "as a rule something more than mere inadequacy of price must appear before a sale can be set aside unless the inadequacy be so great as to shock the conscience."

Dazet v. Landry, 22 Nev. 261; 38 Pac. 264.

So in Illinois:

"Where on a sale of lands made by the master in chancery, under a decree in partition, the order of the court directing such sale, was in every particular faithfully complied with, and all the proceedings were conducted with the utmost fairness, such sale will not be disturbed, even though the lands were worth one hundred per cent. more than the sum actually bid for them, and for which they were sold."

Comstock v. Purple, ubi supra.

Master having made a partition sale and "on the coming in of the master's report, exceptions were taken, and a motion was made to set aside the sale."

"Judicial sales will not be disturbed for mere inadequacy of price, unless the price obtained is so grossly inadequate as to amount to fraud."

Duncan v. Sanders, 50 Ill. 475.

Also in Maryland on exceptions to ratification of sale of trust lands:

"A sale of trust land being fair and regular, it will not be set aside because the purchase price is somewhat less than the value of the land."

Thompson v. Ritchre, 80 Md. 270; 30 Atl. 708.

And so in Arkansas it has been held that an inadequate price is not sufficient to entitle defendant to a re-sale.

Nix v. Drangan, 56 Ark. 240; 19 S. W. 669.

In Kentucky on appeal from the confirmation of a sale on execution mere inadequacy, in this case not large, was held not sufficient.

Robb v. Hannah's Executor (Ky. 1890), 14 S. W. 360.

And in a case where on a judicial sale the property was worth more than three times what it was sold for the Court said nevertheless:

"Unless there was injustice or wrong done to the owner and debtor (who was a married woman) by reason of mistake or misconduct of the Commissioner as alleged by her the sale must stand."

Passmore v. Moore (Ky. 1893), 22 S. W. 325.

To like effect:

Alms & Doepke Co. v. Gates, (Ky. 1895) 32 S. W. 1088.
Ison v. Kinnaird, (Ky. 1891) 17 S. W. 633.
Terry v. Swinford, (Ky. 1897) 41 S. W. 553.
Owens v. Owens, (Ky. 1899) 52 S. W. 822.

So in Pennsylvania in numerous cases on confirmation:

Stroup v. Raymond, ubi supra.
Hollister v. Vanderlin, 165 Pa. St. 248, 30 Atl. 1002.
Cake v. Cake, 156 Pa. St. 47, 26 Atl. 781.
Felton v. Felton, 175 Pa. St. 44, 34 Atl. 312.

So in a case where the property was sold in gross for one-third of its value, and it was sought to set aside the sale and sell in parcels, the South Dakota Court said:

"The inadequacy of price is also complained of as another cause why the sale should be set aside. Inadequacy is not such an irregularity as will warrant a judicial or execution sale to be set aside, unless accompanied by other facts showing, or tending to show, that such inadequate price was brought about by other acts or irregularities that were unlawful, or resulting from mistake, accident, surprise, misconduct or fraud."

First Nat. Bank of Deadwood v. Black Hill Fair Assn., 2 S. Dakota, 145, 48 N. W. 852.

In Alabama where the sale was for $305.00 and the land worth $900 with tax incumbrances of $243, it was held the sale would not be set aside for inadequacy.

Glennon v. Mittenight, 86 Ala. 455, 5 So. 772.

In an earlier case in a chancery sale, it is said:

"Where a stranger purchases at mortgage sale, it will not be set aside for mere inadequacy of price, however gross, unless there be some unfairness at the sale, or the parties interested are surprised, without fault or negligence on their part."

Littell v. Zuntz, 2 Ala. 256, 36 Am. Dec. 415.

"Ordinarily inadequacy of price paid is not alone sufficient cause for setting aside a judicial sale, particularly of personal property of fluctuating value."

Conway v. John, 14 Colo. 30, 23 Pac. 170.

Where the Court refused to confirm a sheriff's sale it was held:

"Inadequacy of price, taken alone, is seldom, if ever sufficient to authorize the setting aside of a sheriff's sale."

Means v. Rosevear, 42 Kans. 377, 22 Pac. 319.

McGeorge v. Lease, 37 Kan. 387, 4 Pac. 846.

"Mere inadequacy in the price bid at a fairly and regularly conducted sale" (made pursuant to the order of the chancellor) "will not justify refusal to confirm the sale."

Bethleham Iron Co. v. Philadelphia & S. S. Ry. Co., 49 N. J. Eq. 356, 23 Atl. 1077.

"The practice of the English chancery, of opening biddings at the master's sales, has not been adopted here."

Williamson v. Dale, 3 John, Ch. (N. Y.) 290.

"Mere inadequacy of price is not sufficient ground for setting aside a sale, unless the inadequacy be so gross and palpable as, of itself, to afford evidence of actual fraud."

Osgood v. Franklin, 2 John. Ch. (N. Y.) 123.

The rule that the Court will not set aside for mere inadequacy of price unless so great as to shock the conscience, has been announced in a number of cases without indicating what inadequacy will shock the conscience.

Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732.

Magann v. Segal, ubi supra.

Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 54 Fed. 26.

Fidelity Insurance Trust Co. v. Roanoke St. Ry. Co., 98 Fed. 475.

(c) Cases not already cited and not cases of the confirmation of a judicial sale which affirm the principle that mere inadequacy of price is not sufficient.

In addition to the cases already cited under (a) and the cases of confirmation of sale, we cite the following cases where the principle is recognized.

Thus mere inadequacy of price is not sufficient:

Homerfeldt v. Zellers, 7 N. J. L. 156.
Lennon v. Heindel, 56 N. J. E. 8, 37 Atl. 149.
Morrisse v. Inglis, 19 Atl. 16, 46 N. J. E. 306.
Mercereau v. Prest, 3 N. J. E. 460.
Bank of New Brunswick v. Hassert, 1 N. J. E. 1.
Simmons v. Vandergrift, 1 N. J. E. 55.
Quigley v. Breckinbridge, 180 Ill. 627, 52 N. E. 580.
Barling v. Peters, 134 Ill. 606, 25 N. E. 765.
Pickering v. Griggers, 59 Ill. 65.
Gibbons v. Bressler, 61 Ill. 110.
McMullen v. Gable, 47 Ill. 67.
Noyes v. Grue, 23 Ill. 450.
Ackerman v. Hendricks, 117 Iowa,, 106, 90 N. W. 522.
Herden v. Trustees College Bible, (Ky. 1898) 20 Ky. Law. Rep. 30, 45 S. W. 67.
Parker v. Hannibal, 44 Mo. 415.
Meir v. Zelle, 31 Mo. 331.
Choutean v. Nickolls, 20 Mo. 442.

Media Title & Trust Co. v. Kelly, 185 Pa. St. 131, 39 Atl. 832.

Mead v. Munroe, 113 Pa. St. 220, 8 Atl. 374.

Cooper v. Wilson, 96 Pa. St. 409.

Cooper v. Galbraith, 6 Fed. Cases, 3193.

Cowles v. Phœnix Mut. Life Insur. Co., 63 Kan. 883, 65 Pac. 217.

Bocher v. Louisville, 76 S. W. 18, 25 Ky. L. Rep. 492.

Konic v. Hill, 127 Cal. 162, 59 Pac. 832.

Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902.

Summerville v. March, 142 Cal. 554, 76 Pac. 389: 100 Am. St. Rep. 145 and note.

Koch v. West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394.

Even gross inadequacy is not of itself sufficient.

Cavender v. Smith, 1 Iowa 306.

It must be coupled with other circumstances sufficient to give rise to the presumption of fraud or unfairness.

Palmour v. Roper, ubi supra.

Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646.

Dobbins v. Wilson, 107 Ill. 17.

The inadequacy must amount to evidence of fraud.

Quigley v. Breckinridge, ubi supra.

Barling v. Peters, ubi supra.

Duncan v. Sanders, ubi supra.

It is a mere fact admissable as evidence to establish fraud.

Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

Central Pac. R. R. Co. v. Creed, 70 Cal. 497.

It cannot effect the purchaser's right where he has no notice of a fraud or irregularity, even when it is held that the court has a large discretion in these cases.

Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 34 Am. St. Rep. 513.

II.

THE DISCRETION TO SET ASIDE A JUDICIAL SALE IS A LEGAL DISCRETION AND NOT AN ARBITRARY ONE, AND IS TO BE EXERCISED UNDER THE RULES OF LAW AND THE EXERCISE OF THIS DISCRETION UNDER AN ERRONEOUS RULE OF LAW IS CLEAR ERROR.

The Supreme Court of Hawaii affirmed the order of the Court below on the ground that while there was an appeal from the exercise of the discretion of the trial judge, "that they should not be reversed except where they are clearly erroneous. Considerable weight should be given to the opinion of the trial judge in a matter of this kind. Under the circumstances we are of the opinion that the order appealed from should not be reversed and accordingly it is affirmed." (Tr. p. 59.)

In other words, the order was affirmed not in the exercise of the discretion of the Supreme Court, but in affirmance of the discretion of the judge of the Circuit Court. His discretion, however, was clearly exercised under an erroneous view of the law. He found that there was no evidence of the actual value of the property as a whole (the manner in which it was advertised and offered for sale), but that there was evidence that if sold separately it would bring at least seven times the value (Tr. p. 48) and then says:

"Under a judicial sale no bidder acquires any interest in the property for which he has bid, and upon the coming in of the return and report of the commissioner, referee or receiver, and after a hearing upon the same, the confirmation or disaffirmance of the sale is a matter which rests absolutely with the court, in the exercise of a sound judicial discretion. If it appears to the satisfaction of the court upon due proof that the price or sum bid is disproportionate to the value of the property offered for sale to such an extent that upon a re-sale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale—can be obtained, it is the duty of the court to order a re-sale, and a failure on the part of the court to discharge its duty in this particular would, on appeal, constitute reversible error." (Tr. p. 49.)

In other words, he holds that it is a matter which rests in sound judicial discretion, but that the rule of law is that if more could be obtained on a re-sale than on the original sale exclusive of the amount bid, he was bound to set aside the sale.

How then have we had any opportunity to appeal to the discretion of the chancellor exercised under proper rules of law, or had our day in Court under these rules of law before the Supreme Court of Hawaii, which has simply affirmed the judgment as an exercise of discretion on the part of the Circuit Judge, although that discretion was exercised under the erroneous view of the law held by that Court?

The authority of the Circuit Judge must be exercised and governed by the principles of judicial discretion under the rules of law.

Ex Parte Farmers' Loan & Trust Co., 129 U. S. 206, 32 L. ed. 656.

Blossom v. The Milwaukee and Chicago R. Co., 1 Wall. (U. S.) 655: 17 L. 673.

Where property sold for $4700 testimony of an offer of $9805, held not sufficient to open sale, the court saying:

"The discretion to be used by the court in confirming sales of guardians must conform to established principles.

The English practice of opening biddings at such sales is not adopted in this state.

As a general principle, mere inadequacy of price is not a sufficient cause for setting aside a sale."

Ayers v. Baumgarten, 15 Ill. 444.

"The Chancellor has a broad, but not arbitrary, discretion in the matter of approving or disapproving a master's sale made subject to the Court's approval by the terms of the decree; but such discretion must be exercised according to rules of law.

The Court's action in approving or disapproving a master's sale may be assigned for error by the proper parties."

Quigley v. Breckenridge, ubi supra.

It is an erroneous exercise of such a discretion to set aside a sale because more can be realized on a re-sale.

Morrisse v. Inglis, ubi supra.

Bethleham Iron Co. v. Phil. & S. S. Co., ubi supra.

American Insurance Co. v. Oakley, 9 Paige (N. Y.) 259.

Pewabic Mining Co. v. Mason, ubi supra.

In a Georgia case already cited it was distinctly held that where the officer had sold the property as a whole for one-fifth what it would bring in lots, and the error was one simply of judgment, as in this case, the sale could not be set aside on that ground because five times as much could be secured on a re-sale.

Palmour v. Roper, ubi supra.

So in Pennsylvania, in an execution sale, which in that State as in some others is subject to confirmation by the Court, where it was admitted by the Court that the setting aside or refusing to set aside of a sheriff's sale is in the sound discretion of the Court below, and unless there be a manifest and gross abuse of that discretion that the Court would not disturb that decree.

"But it may be argued that there was a gross or manifest abuse of discretion here, because the learned judge of the common pleas sets out, as a reason for setting aside the sale, gross inadequacy of price, which the law has settled is not of itself a sufficient reason. If this were the only reason on which the decree rested, the argument of appellant would be sound. Clearly, it is an abuse of discretion when, to reach a decree, the court itself over-rides the established law."

Stroup v. Raymond, ubi supra.

"The purpose of the law is that the sale shall be final: and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matter which ought to have been attended to by the complaining party prior thereto. And in this respect regard may properly be had to all that has transpired before, for the conduct of the parties, their acts and commissions, may largely interpret their action at the time of the sale."

Pewabic Mining Co. v. Mason, ubi supra.

See also:

Moore v. Triplett, 96 Va. 663, 32 S. E. 50, 70 Am. St. Rep. 882.

The purchaser in this case is in no way responsible for the inadequate price. There has been no surprise or mistake caused by him, and many of the cases hold that something more must appear than the opportunity to get a higher price.

American Ins. Co. v. Oakley, ubi supra.

Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614.

Barling v. Peters, ubi supra.
Quigley v. Breckinridge, ubi supra.
Johnson v. Dorsey, 7 Gill (Md.) 269.
Hays v. Steiger, 29 N. J. E. (2 Haw.) 196.
Young v. Teague, 1 Bailey Eq. (S. C. 1830).

We respectfully submit that the action of the Circuit Court, in setting aside the sale where there is no surprise or fraud alleged, and the only mistake which has been made has been in selling the property as a whole, in which, apparently, all parties except the purchaser concurred, where the purchaser has been entirely free from responsibility for the alleged low price, and particularly where the court set aside the sale under the erroneous view that it was his duty so to do if more could be realized on the re-sale, should be reversed.

Respectfully submitted,

William R. Castle,
David L. Withington,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 216.

C. G. BALLENTYNE AND HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANTS,

vs.

WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY, APPELLEES.

BRIEF FOR APPELLEE WILLIAM O. SMITH, TRUSTEE.

WILLIAM O. SMITH,
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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR WILLIAM O. SMITH, TRUSTEE, APPELLEE.

Not yet having before us the brief for the appellants and wishing to indicate certain facts appearing on the record, we desire to present the following

Statement of the Case.

Upon a bill for the foreclosure of a deed of trust, pending before the Honorable W. J. Robinson, third judge of the

First Circuit Court of the Territory of Hawaii, sitting at Chambers, in equity, the court made a decree for the foreclosure of the deed and the sale of the mortgaged property, the greater part of which consisted of the property and effects of the Pacific Heights Electric Railway Company, Limited. The company had ceased business and closed its plant before proceedings began.

The decree directed the court's commissioner, therein appointed, to "sell all and singular the property * * * or so much thereof as shall be necessary to raise the whole amount due" (Transcript of Record, page 33), the commissioner then "to make due and full return of such sale to this court for its approval and confirmation" (Transcript of Record, page 34).

The sale was advertised by the commissioner, by newspaper publication, as one to be made "subject to the confirmation of the court" (see Exhibit "A," Transcript of Record, page 41), and likewise by posting of bills. (See Exhibit "B," Transcript of Record, page 42.) The decree and notices of sale were read at the sale. (See commissioner's return and account of sale, Transcript of Record, page 37.)

Pursuant thereto the commissioner held a sale on February 4, 1905, at which he offered the entire property as a whole, excepting only a certain steam condenser, sold separately, and a cable, reserved from the sale because affected by a pending writ of error brought by the Rapid Transit and Land Company. The highest bids offered were: for the condenser $100, and for the railway property, $1,100, this last having been made by C. G. Ballentyne, an appellant here (Transcript of Record, page 37).

The commissioner made return to the court with the representation that the respective sums so bid were disproportionate to the values of the properties, and the recommendation that the sales should not be confirmed (Transcript of Record, page 38).

The bids aggregated but $1,200, against which the com-

missioner's return and account of sales showed $1,338, expenses and charges, plus $247.80 for sums advanced by the petitioner for costs of suit and watchman's wages, or $1,585.80 for expenses alone, leaving a deficit here of $385.80, exclusive of the commissioner's fee. Besides this deficit on account of costs and expenses of suit and sale, there remained wholly unsatisfied the large judgment on the mortgage debt, in the sum of $56,025, making the total deficiency, exclusive of the commissioner's fee, of $56,410.80. (See Transcript of Record, pages 38 to 40.)

Motions were filed, on the one hand, by the bidder, C. G. Ballentyne, an appellant here, for a confirmation of the sale of the railway property (Transcript of Record, page 44), and, on the other hand, separately by the appellees, *contra*, the latter with a prayer for an order directing a resale of the property in parcels (Transcript of Record, pages 44 and 46). The motions for resale were based upon the ground of gross inadequacy of price, and that a confirmation would unfairly prejudice the parties for whose benefit the action was brought and those who were interested therein, and also that a resale in parcels instead of as a whole would be more beneficial.

On the hearing before the court a great amount of testimony was received, pro and con, to establish the real salable value of the property, and the court found that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the highest bid (Transcript, page 48), and ordered a resale of the railway property in parcels. The steam condenser was sold separately and is not concerned on this appeal. In speaking of the "property" we refer always only to the railway property.

On an appeal this order was affirmed, and hence this final appeal.

Deeming that certain other points sought to be made by the appellants on the last appeal, and controverted by the appellees, have now been abandoned by the appellants, in

that they have provided no foundation therefor in the record now before this court, we touch upon none of them; but we desire to comment upon what might otherwise seem an inexplicable circumstance—*i. e.*, the appearance of the Honolulu Rapid Transit and Land Company as an appellant here.

It is claimed by that company that it obtained an assignment of the rights of C. G. Ballentyne under his bid—a "transfer of the property," as appellants have put it—after the date of sale and before the hearing on return of sale. Appellants have heretofore claimed that this was a sale of the property by the purchaser to a third person, to which we have rejoined that the transaction amounted to nothing more than a transfer of an unaccepted bid, which bid was made subject to acceptance and confirmation by the court, but which has never been either accepted or confirmed. The transit company was, moreover, a party to the foreclosure suit itself, on account of having been possessed of a certain cable acquired by it from the Pacific Heights Electric Railway Company, Limited, subject to the trust deed, and so had full notice of the terms of the decree and sale. We submit that this rebuts any claim that that company was a purchaser for value or without notice. The cable not having been covered by the rejected bid, the company is not a party to this appeal in that connection.

ARGUMENT.

The issue on this appeal is single and is one of law only. The only fact heretofore in issue was that of the value of the property and whether such value exceeded the amount of the bid. By grace of the court's finding that the value was grossly in excess of the bid the appellants are now able to claim that the amount involved in the case is sufficient to bestow jurisdiction for this appeal, and they no longer claim that the bid was not grossly inadequate. It is submitted

that their very appeal here precludes them from questioning that character of the bid. It is now contended, therefore, by the appellants that upon a judicial sale inadequacy of price, however gross, if not coupled with any facts or circumstances showing fraud, irregularity, mistake, or the like, is not a sufficient ground to warrant a refusal by the court to accept the best bid, whatever it may be, and confirm the sale.

Following this claim the appellants cite authorities which in the main, in the view of the appellees, relate not to judicial but to execution or law sales, or those made under a statute pursuant to its fixed terms, by an executive officer, as distinguished from sales made and conducted by a court through its appointed agents.

The appellees before the court rely upon two positions:

First. That the decision of the Supreme Court of the Territory of Hawaii in this case, though not so broad as contended for by the appellees, amply covers the case at bar and is supported by the authorities, which, we also submit, go further than the decision itself. And in this decision it is declared that "a judicial sale may be set aside before con- "firmation for such gross inadequacy of price as shocks the "conscience or raises a presumption of unfairness, but not "for mere inadequacy unless accompanied by other cir- "cumstances such as fraud, accident, mistake, etc.; and "whether such a sale should be set aside or confirmed is "largely a matter of sound judicial discretion, and a de- "cision by the trial court in a case of this nature should "not be reversed unless clearly erroneous." (See syllabus, Transcript of Record, page 52.)

Second. That our primary contention in this case still holds good; that the rule contended for by the appellants is applicable only to execution or law sales (except where statutes intervene), and that in judicial sales the court making them has full power in its discretion to reject an in-

sufficient bid and refuse to confirm a sale, and otherwise to conduct its sales as it deems for the best interests of the cause and the parties before it, and that a person bidding at such a sale, "subject to confirmation by the court," acquires no vested right to have his bid accepted merely because it is the best bid made, and acquires no rights under his bid until the same is accepted by the vendor, the court, and the sale confirmed.

Preliminarily, we state our contention, in every view of the case, as said by the circuit court in its decree: "This is "not an application to *set aside a sale* but merely a hearing "upon a return of sale for the purpose of determining "whether or not the sale should be confirmed" (Transcript of Record, page 49). This is more fully covered by our discussion of the second ground relied upon by appellees.

OF THE FIRST POSITION OF APPELLEES:

In our argument heretofore we have urged that, even conceding that the rule in question is applicable as well to judicial as to execution sales, it is not in the conjunctive, as claimed by the appellants, in the sense that the inadequacy must be so gross as to shock the conscience *and* either be presumptive evidence of fraud or be accompanied by circumstances showing accident, mistake, etc., but it is in the alternative, "or"—that is, that inadequacy, if so great as to shock the conscience or sense of fairness, is of itself sufficient to warrant the rejection of the bid and the making of a resale where the sale is judicial.

Our Supreme Court has distinguished between "*mere* inadequacy" and "inadequacy so gross as to shock the conscience or imply unfairness"—that is, that "mere" inadequacy means "slight" inadequacy and not inadequacy "alone," saying also that "if the inadequacy is *not gross*, it should be accompanied by other circumstances" (opinion, Transcript of Record, page 53; italics ours).

And our court has also held in this case that in the case of a judicial sale "it is the grossness of the inadequacy which implies the fraud or unfairness, and it is sufficient if the inadequacy is so great as to imply that, even though it does not suggest the nature of the fraud and there is nothing else to show in what it consisted. * * * It is sufficient if the grossness of the inadequacy is such as to afford substantial evidence that for some perhaps unknown reason the property has been greatly undersold" (Transcript of Record, page 57), adopting the words of the court in the case of Magann *vs.* Segal, 92 Fed., 252, quoted in Transcript of Record, page 56, where there follow also the words "so much so that the purchaser has not only merely a bargain, with a fair margin for profit, but an unconscionable advantage of the parties for whose benefit the sale has been made."

The court, after a review of the evidence of value, has accepted the finding of the circuit court "that the price bid was grossly inadequate and that an amount vastly in excess of that could be obtained on a resale," and that "the evidence was overwhelming that the actual value of the property was at least seven times the amount of the highest bid" (Transcript of Record, pages 48 and 58), and therefore has branded the bid in this case as one "grossly inadequate;" so much so that it considered it unnecessary to pass upon the other circumstances which were presented, in addition to the claim of inadequacy, tending to show that the defendant Desky, who, next to the bondholders, was most interested in the property, was excusably misled into supposing that the sale was to occur at a different time or place, and so was unable to be present, and likewise declined to pass upon the point made that property of the character and condition in question should have been offered in parcels instead of as a whole, and the fact that it had been offered as a whole had resulted in bidders having been kept away because they would not consider taking over the whole property, but would compete for selected portions (Transcript of Record, page 58).

To have been relied upon here we assume that the evidence of the circumstances, not even sufficiently referred to by the court in its passing attention thereto, should be upon the record before this court to permit a determination of their sufficiency, if necessary, though we believe that the existence of the claim thereof fully appears by the decision as above noted. In our confidence, however, that no such matters are needed to support a decision in favor of the appellees we have not presented them here, and, in fact, neither did the circuit court consider it necessary to pass upon them.

Authorities from other jurisdictions are clearly in support of the principle here decided and applied, many of them going beyond the extent required to uphold the ruling before us.

As to the use of the alternative "or" instead of "and," whereby it meant that gross inadequacy of price, shocking to the conscience, is sufficient of itself, see:

Graffam vs. Burgess, 117 U. S., 180, 191.
Rorer, Judicial Sales, sec. 28.
17 *Am. & Eng. Ency. of Law* (2d ed.), pages 1000-1002.
Magann vs. Segal, 92 Fed., 252, 259.
Pewabic Mining Co. vs. Mason, 145 U. S., 367.
Fidelity Ins. Co. & S. D. Co. vs. Roanoke St. Ry. Co., 98 Fed., 476.
Marlett vs. Warwick, 18 N. J. E., 111.

For cases as to a *sacrifice* being sufficient see:

Ganst vs. Moss, 20 Ill., 549.
Page vs. Kress, 80 Mich., 85.

We submit that there is fallacy in the argument, and in the few cases which support it, that while the courts must strictly adhere to the rule that in the absence of anything additional to inadequacy of price (however gross) the sale must stand, yet they must "seize upon" or "grasp" *any*

slight circumstances to assist or justify them in interfering. It is plainly conceded that inadequacy is the cause of their desire to do so. "Inadequacy is still the main ground for disturbing the sale, for if the price were of full value, or even a passable one, then the objectionable facts or circumstances could have worked no evil" (Transcript of Record, page 55). Why adhere to a mere legal fiction (if it exist at all) which prevents justice being done when it is perceived that it should be done and when the cause for interference exists and is recognized as such?

In the case of *Smith vs. S. S. City of Columbia*, 11 Haw., 709, our Supreme Court used the conjunctive "and" in stating their view of the rule, but in their opinion in the present case, in response to appellees' examination and views of that case, they say that though it is true that in that case they used the conjunctive, yet it was not with the intention that these two conditions of the rule respecting a resale should be considered "as being two different or disconnected things which must unite in order to warrant setting aside a sale" (Transcript of Record, page 57).

And the court has applied the rule, in this light, to the case at bar; it has held that "gross inadequacy" is sufficient, for that implies an unfairness or disadvantage that should be removed. The cases reviewed by the court certainly sustain the decision, and the present case comes well within the rule adopted.

We rely upon the sufficiency of the decision in this case to insure its affirmance on the present appeal.

OF THE SECOND POSITION OF THE APPELLEES:

The rule referred to is strictly applicable only to law or execution sales as distinguished from judicial sales proper.

We believe that many of the cases which, at first blush, seem to comprehend all sales and support appellants' claim will, upon an examination, show that almost without exception they apply to execution sales at law and not to

judicial sales, or that they are the result of a misapprehension and misapplication of the law rule, and a reference to their own citations will usually demonstrate this. Their very authority rests on cases decided with respect to execution sales. There are, however, some cases of the highest authority which apply the rule to strictly judicial sales, but always with the limitation provided by use of the alternative "or" instead of the conjunctive "and." These we have already referred to in the foregoing portion of this brief.

It is our view that the cases discussing the points of refusal to set aside a sale or to confirm a sale for inadequacy of price may very properly be classed under at least three distinct heads, namely:

Class I: Legal, or non-judicial, sales, concerning which the term "legal" or "law" sales should be used instead of "judicial" sales, this being a correct statement of the rule itself;

Class II: Sales under code practice and sales not purely judicial, where the rule may or may not apply, according to the status of the sale under statutes bearing upon their conduct or effect; and

Class III: Judicial sales, to which the rule should have no application.

Class I: In this are included execution sales, sales under power in mortgages and deeds of trust, etc., and all sales not made under direct judicial decree or requiring confirmation by the court ordering and holding them. The rule that inadequacy of price is not alone sufficient to justify the setting aside of a sale at law applies to this class.

The term "judicial sale" is used with much freedom by counsel for the appellants, and, it seems, sometimes indiscriminately by some of the courts, as applying to all sales resulting from legal proceedings in a court either of law or equity.

A "judicial sale" does not include a sale at law or any sale not in contemplation of law made directly by the court

and subject to its confirmation. On this point we quote from *Freeman on Void Judicial Sales,* section 1, inasmuch as it succinctly states and supports our argument:

"Precisely what sales can accurately be denominated 'judicial sales' is not very well settled. Of course they must be "the result of judicial proceedings, and the order, decree or "judgment on which they are based must direct the sale of "the property sold. There can be no judicial sale except "on a pre-existing order of sale. And probably the order "of sale, is not, alone, sufficient to entitle the sale to be "called judicial. In a State where an administrator's sale, "though made by virtue of an order of court, was not re"quired to be reported to the court nor to be confirmed, "Judge Story held it not to be a judicial sale. If, however, "a sale is ordered by the court, is conducted by an officer "appointed by, or subject to, the control of the court, and "requires the approval of the court before it can be treated "as final, then it is clearly a judicial sale. * * *

"Execution sales are not judicial. They must, it is true, "be supported by a judgment, decree or order. But the "judgment is not for the sale of any specific property. It is "only for the recovery of a designated sum of money. The "court gives no directions, and can give none concerning "what property shall be levied upon. It usually has no con"trol over the sale beyond setting it aside for non-compliance "with the directions of the statutes of the State. The chief "differences between execution and judicial sales are these: "the former are based on a general judgment for so much "money, the latter on an order to sell specific property; the "former are conducted by an officer of the law in pursuance "of the directions of a statute, the latter are made by the "agent of a court in pursuance of the directions of the court; "in the former the sale is usually complete when the prop"erty is struck off to the highest bidder, in the latter it must "be reported to and approved by the court."

See also—

Rorer, Judicial Sales, sections 1 to 30, inclusive, and particularly from section 5 onward.

17 *Am. & Eng. Ency. of Law* (2d ed.), pages 953 and 956.

On pages 989-990 of 17 Am. & Eng. Ency. of Law, under the title "Necessity for confirmation" and in the note found on page 956 of the same volume, entitled "Extent to which cases on execution and sheriffs' sales will be used in this article," will be found the true scope of the article on judicial sales in that work, notwithstanding the general expression of the rule found on page 1000.

Where by statute in some jurisdictions sheriffs' sales and execution sales have been placed on a par with all other sales, judicial and otherwise, we submit that this cannot prejudice the view that a "judicial sale" proper cannot thereby be reduced to the class of execution sales, at least in jurisdictions where no such statute exists.

It seems clear that in cases of sales at law the acceptance of the purchaser's bid operates at once to vest in him the ownership of the property and gives him an absolute right to have the sale completed. No confirmation is necessary, nor can the sale be subject thereto.

In the absence of any circumstances connected with such a sale and its conduct, such as fraud, mistake, surprise, etc., over which matters equity will take jurisdiction, no ground for equitable jurisdiction is afforded, and no relief can be obtained by a bill in equity to have the sale set aside. In such cases, where no ground for original equitable jurisdiction is presented and the only ground urged for affording the relief sought, upon an independent bill for such relief, is that of inadequacy of price, courts of equity, following the settled rule that in the absence of a ground for the exercise of equitable jurisdiction, as fraud, mistake, etc., occurring in a proceeding carried on under due form of law and in a law court, will not interfere. It has no jurisdiction to do so. Hence has arisen the rule now urged by the bidder in this case, which his counsel take to be the rule in all cases of all kinds of sales. The rule so established loses or fails of application to sales of an essentially different character and under an essentially different jurisdiction—under decrees in proceedings in equity. Cases cited which are prop-

erly assignable under this first division—law sales—and the rule which has grown out of them should not be taken as authority for application of the rule to sales strictly judicial. It cannot be said that because such decisions emanate from courts of equity they must apply to sales made under equitable jurisdiction. They constitute no more than a line of cases where equity declines to take jurisdiction or declines to interfere, where no grounds for equitable relief from otherwise regular and valid proceedings at law are set up.

Freeman on Executions, section 304*i*, heretofore cited by the appellants, does not contemplate cases originally brought in equity, but only those where "resort is had to an independent suit for the purpose of setting aside a sale" where it has been held that mere inadequacy of price, however gross, is not of itself a sufficient ground for relief.

This case having been brought in a court of equity, there is no need for casting about for grounds upon which the court may exercise its equitable jurisdiction over this phase of the cause.

Our reasoning is made all the stronger by the exceptions, found in many cases, that where there is fraud, mistake, surprise, or where the inadequacy is so great that fraud is presumed, these all occurring in a proceeding at law and all laying a special foundation for equitable interference, there will equity, on a bill for specific relief to have a law sale set aside, grant it if the mistake or surprise be sufficiently shown or the fraud or the presumption of it be not removed.

Under this first class of cases should also be included sales under a power, as in mortgages, pledges, trust deeds, etc., these being sales "equivalent to a sale pursuant to a judgment in an action at law" (2 Jones on Mortgages, sec. 1751).

To illustrate the argument that the confusion of all sales as "judicial" has grown largely out of a loose use of the term "judicial sales" we refer to

Rorer, Judicial Sales (2d ed.),

where, in chapter XVII, entitled "Setting aside execution sales," in sections 1086 to 1098, is set down the whole résumé

of the law in that respect as to execution sales at law, which counsel here and the courts in some jurisdictions have, because of an inexact use of the term "judicial sales," taken as the whole law on "judicial sales." But in the same work, at the very outset, is the law as to judicial sales proper, from sections 1 to 30, in which the law, as we view it, is fully set out and distinguished. See also section 106 of this work.

Again, Freeman on Execution, section 304*i*, has been cited by appellants. It is again on execution sales. But turn to section 311, and again the distinction is drawn.

Also let us quote briefly from section 21 of *Rorer on Judicial Sales* as to confusion of execution and judicial sales:

"In Griffith *v.* Bogert (18 How., 158, 164) Justice Grier "speaks of an execution sale as a judicial sale. But by "reference to that case it will be seen that it emanated "from Missouri, where by the statute laws execution sales "at law are reportable to the Court for confirmation. "* * * Such, too, is the case in Pennsylvania and some "other States."

Class II—Sales of a mixed character:

This class is the apparent result of the statutory abolishment in some jurisdictions of the distinction between execution sales, sheriffs' sales, and judicial sales, and also where by statute all actions at law and in equity are reduced to a common form and where a special execution is authorized in some cases. Here we find cases applying the rule under discussion to all sales, all being covered by use of the term "judicial sales." The result is a line of cases "not purely judicial." (See 2 Jones on Mortgages, sec. 1639.) To illustrate, some of these are as follows:

In the State of Nebraska, after the enactment of a special statute, the nature of which appears in the following quotation, its effect was noted as follows:

"The statute requires all real-estate sales upon execution "or order of sale, to be appraised, and provides that it shall

"not be sold for less than two-thirds of its appraised value. "The distinction, therefore, between sales upon execution "and those denominated judicial sales, has to a great ex- "tent been abrogated. This distinction however still re- "mains, that the sheriff in making a sale under an exe- "cution acts as the ministerial officer of the law, and not "as the organ of the court, the court neither ordering out "the execution or directing a sale of the debtor's prop- "erty. But in sales made under the authority of a decree "the court is the vendor, the commissioner making the "sale being the mere agent of the court."

Parrat vs. Nelligh, 7 Neb., 456.

See also *Bachle vs. Webb,* 11 Neb., 423, which shows that the court of that State did not regard the distinction between execution and judicial sales as altogether destroyed by the statute.

In our briefs heretofore we have presented to the courts below an exhaustive examined list of all the cases bearing in any way upon the question here, but we now omit not only the mass of collation *not* cited by the appellants, but also all of appellants' citations of cases which we deem properly assignable to the class of "legal" or "non-judicial" sales, as we feel that any reference to them, if cited, will serve the same end. But we desire to mention here a few examples of appellants' citations which we place in the second class of cases, namely:

Wall vs. McGalliard, 67 Ill., 519:

The reasoning in this case aptly supports our point, hereinafter made, of the effect of the existence of a statutory right of redemption after sale, and we here quote from it as follows:

"At judicial sales, where there is a redemption, it is a "well-known fact that lands, unless where necessary to "secure the debt, are rarely sold at anything approximat- "ing their real value. Such purchases are not looked "upon as a desirable mode of investment. There is seldom

"competition. The creditor for the most part has to take "the land in satisfaction of his debt and wait for it to be "redeemed;"

stating, then, the "rule" that mere inadequacy of price is not a sufficient cause for setting aside a sale, and citing:

20 Ill., 266, a bill to set aside a law judgment.

44 Ill., 398, a bill to set aside a mechanic's lien sale.

15 Ill., 444, a guardian's sale, citing 11 Johns., 556, and 26 Wend., 143, law sales.

Sigerson vs. Sigerson, 32 N. W., 462:

Foreclosure and special execution thereon.

Fidelity, etc., Co. vs. Roanoke Iron Co., 84 Fed., 752:

Cites authorities on execution sales.

C. P. R. R. Co. vs. Creed, 70 Cal., 497;
Connick vs. Hill, 127 Cal., 162;
Summerville vs. Murch, 142 Cal., 554;
Anglo-Cal. Bank vs. Cerf, 142 Cal., 303:

All foreclosure sales with special execution issuing against the mortgaged property primarily. The statute is quoted below.

Benton vs. Shreeve, 4 Ind., 69, 70-71:

An execution on foreclosure. It cites:

Livingston *vs.* Byrne, 11 Johns., 525, an execution sale.

White *vs.* Damon, 7 Ves. Jr., 30-34, an auction sale voluntarily made by the owner.

Mercerau *vs.* Priest, 3 N. J. E., 460, an execution, judgment, and sale at law.

Sales in States where the codes prescribe one common form of action in law and equity practice, and under which,

to foreclose a mortgage, the plaintiff first obtains a *judgment* on the mortgage debt, whereupon *execution* is directed by the court to issue for satisfaction of such judgment specifically against the mortgaged property, there being also a right of redemption after sale, should have no application to cases in the first or third classes; nor should decisions under statutes providing special executions "to be enforced as at law" or under special forms of execution be material.

It is significant that in a majority of the cases where the rule advanced by the appellants is approved and applied to sales in equity reference for authority and practice is usually made to cases of sales where the rule was properly applied—to law sales. For example see:

Benton vs. Shreeve, 4 Ind., 70-71;
Morrissee vs. Inglis, 46 N. J. E., 308, and
Smith vs. S. S. Columbia, 11 Haw., 709.

We think that the application of the rule to cases in this second class is not the result of statutory direction in the main, but rather the growth of a judicial custom brought about by the statutory abolishment of the distinction between sales under execution and in equity, and also by the influence of an existing statutory right of redemption in the States so deciding these cases, both of these causes being often coupled with an inaccurate use of the term "judicial sale."

In the Territory of Hawaii proceedings at law are entirely distinct from proceedings in equity. The court has its two sides—law and equity. In the Territory of Hawaii there is no statutory right of redemption after a foreclosure sale. In this Territory a mortgagor or other person interested in the property sold may obtain full relief only if he bids in the property at the sale. If he cannot do this, his rights are gone. In a majority of the jurisdictions outside of this Territory a mortgagor may save himself at any

time after the sale merely by redeeming after the sale at any time within the statutory limit, usually a year, and may pay the price for which the property was sold, and the greater the inadequacy and the resulting need for relief the more easily is the relief obtainable. By right of redemption we do not mean equity of redemption; the distinction is clear (Brown *vs.* Bannister, 15 Haw., 271).

Where decisions in cases of judicial sales proper are found in other jurisdictions which seem to support the application of the law rule to judicial sales, we urge that it is fair to conclude that the existence of a right of redemption in those States should be taken as having borne its weight in the consideration of the cases. This is evident as well where the right of redemption is not referred as where it is. The following cases show such to have been a material factor prompting the court's refusal to set aside a sale for inadequacy of price:

"Inadequacy of price is stated as one of the reasons why "the sale should be set aside. This is not sufficient ground "upon which to annul a sale, particularly under our prac- "tice when a judgment debtor is allowed to redeem."
Connick vs. Hill, 127 Cal., 165.

Also—

Anglo-Cal. Bank vs. Cerf, 142 Cal., 307.
Schroeder vs. Young, 161 U. S., 334, 338.
Twining vs. Neil, 38 N. J. E., 470.

Also—

2 Jones on Mortgages, sec. 1915, as follows:

"When by statute a time is allowed for redemption under "a sale, mere inadequacy of price does not vitiate the sale, "because the owner of the equity of redemption cannot "be prejudiced," citing 31 Mich., 426, where the court adds the remark that "it is only his failure to do this (redeem) which has been the cause of his loss."

Counsel for appellants have heretofore specially cited cases from Kentucky, Illinois, California, and other States, claiming them to have been unaffected by any statutes. We do not agree. We cannot anticipate what citations will now be made, but we quote the statutes from a few of the jurisdictions named:

In Kentucky the following statute exists:

"Art. V, ch. XXXVI (p. 317). How decrees in chancery "may be enforced.

"SEC. 1. A final order or decree for money, lands, slaves, "or other specific things, may be enforced by any appro- "priate writ of execution, allowable on a judgment at law, "according to the nature of the case.

"1. Such writ shall issue and be returnable as other "writs of execution.

"2. Nothing in this section shall prevent any party from "proceeding to carry any order or decree of the court into "execution, according to the ancient practice of courts of "chancery."

Illinois has a special statute, as follows:

(In foreclosure in equity:)

"The mortgaged premises may be sold to satisfy any "judgment the plaintiff in such action may recover, and "the court may award a special writ of *fieri facias* for "that purpose, to the county or counties in which said "mortgaged premises may be situated, and on which the "like proceedings may be had, as in other cases of exe- "cution levied on real estate" (Rev. Stat. 1897, chap. 95, sec. 21, p. 1104).

In California foreclosure is regulated by code provisions, all forms of actions being common, and special execution is issued against the mortgaged property, upon a judgment recovered, under the following statute:

"There can be but one action for the recovery of any "debt, or the enforcement of any right secured by mort- "gage upon real estate or personal property, which action "must be in accordance with the provisions of this chapter.

"In such action the court may, by its judgment, direct a "sale of the encumbered property (or so much thereof "as may be necessary), and the application of the pro- "ceeds of the sale to the payment of the costs of court, "and the expenses of the sale, and the amount due plain- "tiff. The court may, by its judgment, appoint a com- "missioner to sell the encumbered property. * * * If "the court appoint a commissioner for the sale of the prop- "erty, he shall sell it in the manner provided by law for "the sale of like property by the sheriff upon execution; "and the provisions of chapter one, title nine, part two, "of the Code of Civil Procedure, are hereby made appli- "cable to sales made by such commissioners. In the event "of the death, or absence from the States, or other dis- "ability or disqualification of the commissioner so appointed "to sell encumbered property, the court may, after the time "for redemption has expired, appoint an elisor to make the "deed or deeds due to the purchaser or purchasers or his "or their assigns, of the property so sold by said commis- "sioner" (§ 726, chap. 1, title X, part II, Code of Civil Procedure).

Much reliance has heretofore been placed by the appellants on the case of *Files vs. Brown,* 124 Fed., 133, and particularly upon the quotation therefrom that—

"In the absence of fiduciary relations or extraordinary "circumstances, courts and their officers are as firmly bound "by their actual sales both in morals and in law as private "citizens, and they ordinarily have no right or privilege to "rescind them upon any ground which is not equally "available to a private party."

Yet we submit that this case shows that it applies only to cases where there has been a *contract*—both an offer of a bid and an acceptance thereof by the court—and, moreover, only to cases where there has been a confirmation, and therefore a closing of the bargain, on the side of the court. In this case there was an order made by the court to the receiver *to sell and convey* the property to a *purchaser named* for a *price fixed in the order.* The court held only

that "when the order *has been executed* the court is as firmly "bound in law and in morals as any private citizen by "his *executed sale.*" (Italics ours.)

A marked distinction should be preserved between cases where the application for a resale is made before and where after confirmation by the court. In the one case the sale is incomplete; in the other the act of confirmation has made it complete and given the purchaser a vested right which he had not before held. This has been illustrated by some of the cases heretofore cited in this brief. Cases where the application for resale is made after there has been an acceptance of the bid by the court and a confirmation of the sale are not, then, we submit, fair precedents for cases like that at bar, where there has been a rejection of the bid and no confirmation and the application is promptly made. The record in the present case shows that the sale was held on February 4, 1905 (Transcript of Record, page 36); that the commissioner made his return of sale on February 8, 1905 (Transcript of Record, page 38); that William O. Smith, trustee, filed his motion for resale on February 13, 1905 (Transcript of Record, page 45); that the respondents, The Pacific Heights Electric Railway Company, Limited, and C. S. Desky, filed their protest against confirmation on the same day (Transcript of Record, page 47).

For other cases as to the rights of a bidder before and after confirmation see:

Rorer, Judicial Sales, sec. 545.
Wiltsie, Mortgage Foreclosure, sec. 469.
2 Jones on Mortgages, secs. 1637, 1641.
State vs. Campbell, 5 South Dakota, 636.
10 Wisconsin, 123; 63 North Car., 379.

The cases decided in

161 U. S., 334; 145 U. S., 367; 124 Fed., 137-138, and 92 Fed., 255,

were where the application for relief was made *after* confirmation.

Class III—Judicial sales:

In these the courts have not recognized the application of the rule here under discussion, and make the distinction for which we contend. It is here that the cases relied upon by appellants as authority touching the case at bar are referred to and distinguished. It is only to be remarked that sales of this class are not necessarily all those of foreclosure; other strictly judicial sales are included, as in partition, executors', administrators', and guardians' sales, etc., and also it is important to add that these may be less in number than those of cases of the first and second classes, the prime reasons being the almost universal existence of statutory provisions in the States regulating the method of sales, or combining actions in a common form, or where statutory rights of redemption are given. None of these conditions exist in the Territory of Hawaii.

Of these cases we quote from several as embodying practically the whole of our argument.

Johnson vs. Avery, 60 Minn., 265:

"We have examined all cases cited upon the question of "inadequacy of price, but most of them, excepting Illi- "nois, relate to execution sales. The purchaser's rights "in such sales are absolute, subject however to a right of "redemption. There is a vast difference between such cases "and those in partition, because in partition there is no "right of redemption" (citing Loyd *vs.* Loyd, 61 Iowa, 243).

Loyd vs. Loyd, 61 Iowa, 243 (S. C., 16 N. W., 117):

"Counsel for appellant insist that inadequacy of price "is insufficient to justify the court in setting aside a sale of "this character (partition). They have cited a large num- "ber of cases in which, it is said, this has been determined "by this court. But in the cases cited the sales were all "made by a sheriff under execution, or by a power expressly "conferred upon a trustee, or the like. In such cases no

"approval of the sale by the court is required, nor is any "discretion reposed in it, as in the case at bar. In sales "under execution, the right to redeem ordinarily exists. "Not so in the case at bar, and a different rule exists in "such cases. We believe it can safely be asserted that "counsel have not cited any case in which it has been "held that inadequacy of price is not sufficient to warrant "setting aside a sale of this character. In England an "increase of ten per cent. is regarded as sufficient. Here "the increase is nearly fifty per cent. The ruling of the "court is right and must be affirmed."

The case of *Trust Co. vs. Street Railway Co.*, 96 Iowa, 646-651 (S. C., 65 N. W. Rep., 982), is so manifestly parallel to the case at bar, in the respect that all the parties interested in the suit—the petitioner and the respondents vitally interested—are unanimous in seeking a resale, the only objector being the bidder, with no interest except such as arises from his bid, that we quote from it freely:

"No one contests the application for a resale except Hubin- "ger. In this respect the case is somewhat peculiar. He is "not a creditor nor has he any interest except such as "arises from his bid. It should be borne in mind that "the only authority possessed by the commissioner was to "receive and report the highest bid for the consideration and "action of the court. Hubinger's situation is such that "his right to resist, or even question, the application for "a resale, is questionable. He stands as one who has made "an offer and is awaiting an acceptance. It is not as in "case of the sale of property on execution. Mr. Freeman, "in his work on Executions, says (section 311): 'It must "'be remembered that there is a vast difference between "'execution sales and those made under decrees of chan- "'cery or probate courts, in respect to the rights of the "'purchaser and the power of the courts. In cases of sales "'made under decrees, and which may, therefore, be called "' "judicial sales," when the proceedings are reported to the "'court, the purchaser is simply a preferred bidder. The "'court is not bound to accept the bid, and may, in its "'discretion, refuse to confirm the sale for many reasons "'which would have no application where the purchase was

" 'made under execution.' In Rorer on Judicial Sales (sec.
" 106), treating of the confirmation of sales, it is said:
" 'Until confirmation by the court the sale confers no rights.
" 'Until then it is only a sale in a popular, and not in a
" 'judicial or legal sense. The chancellor has a broad dis-
" 'cretion in the approval or disapproval of such sales. "The
" 'accepted bidder," says the Supreme Court of Kansas, "ac-
" 'quires no rights, as in case of a purchaser under execu-
" 'tion," to have his purchase completed, but is merely a
" 'preferred purchaser until confirmation by the court as
" 'agreed to by its ministerial agent. In the exercise of
" 'this discretion a proper regard is had to the interest of
" 'the parties and the stability of judicial sales.' In Hay's
" appeal, 51 Pa. St., 58, which was a sale of land in a pro-
" ceeding for partition, it was said: 'Heirs to a decedent,
" 'when parties to a proceeding for partition in the orphans'
" 'court, stand in no relation of trust or confidence to the
" 'bidders at the orphans' court sale; and even the highest
" 'bidder, whose bid has been returned to the court as the
" 'best offered, has acquired no right which debars the
" 'heirs or their counsel from endeavoring to have his bid
" 'rejected and a resale ordered. It is their right to have as
" 'much obtained for the property as can be, and until such
" 'a sale has been made and confirmed they may seek for
" 'purchasers who are willing to give more than was offered
" 'at the public auction. His bid, though the highest,
" 'was but an offer to purchase, subject to the approval or
" 'disapproval of the court; and in approving sales made in
" 'partition it is the duty of the court to regard primarily
" 'the interest of the heirs.' "

"This language is significantly applicable to this case.
" Nearly all the parties affected by the decree and order of
" sale ask a resale, and none object to it. The case is made
" to turn squarely on the rights of the bidder, and we find
" nowhere an authority that gives him a favorable, if even
" any, standing in court for that purpose. His reliance,
" by way of authority, is largely on cases of sales on exe-
" cution, where a different rule prevails under universal
" authority. He also cites such cases as *White v. Wilson,*
" 14 Ves., 151, and *Mining Co. v. Mason,* 145 U. S., 349
" (12 Sup. Ct. Rep., 887), where the proceedings were to
" open sales after confirmation. It needs no argument to
" show that a different case is then presented, for, by the
" confirmation, legal rights are obtained. It is the accept-

"ance that completes the sale. Considerable space is devoted "in argument to the rule that sales will not be set aside "for inadequacy of price unless the inadequacy is so great "as to shock the conscience. That rule does not obtain in "this cla-s of cases. Appellee, in support of the rule, refers "us to *Graffam v. Burgess,* 117 U. S., 180 (6 Sup. Ct. "Rep., 686), where the rule is stated approvingly. We "have examined the case and find that it is one to redeem "from a sale of real estate on execution.

"The conclusion that a resale should be ordered is sup- "ported by the fact that there is neither appraisement nor "redemption in this case. This property cost some sixty "thousand dollars or upwards, and the showing prepon- "derates that it is now of three times the value of the present "bid, or more. If the parties could redeem, there would be "an opportunity to protect their interests, to some extent, "at least; but as the order now stands, the sale is final, and "for, confessedly, too small a sum."

In the case just cited the property was of only *three* times the value of the rejected bid; in the case at bar it was found to be *at least seven times* in excess of the bid. In the case now cited the property cost some sixty thousand dollars; in the case at bar the transcript of evidence on the hearing is not now before the court, but in the opinion of the Supreme Court (Transcript of Record, page 52) it is said:

"It is claimed that the property cost $78,000 exclusive "of the right of way only four years before. It was bonded "for $50,000."

See also—

Wood vs. Parker, 63 N. C., 379.
Phillips vs. Benson, 82 Ala., 500 (2 So., 93).
Tice vs. Zuisser, 76 N. Y., 548.
Hale vs. Clauson, 60 N. Y., 339, 341.
Jones on Mortgages, §§ 1637, 1638.
Rorer on Judicial Sales, §§ 8, 16, 17, 545, 529.
Wiltsie, Mortgage Foreclosures, §§ 469, 529.
State vs. Campbell, 5 So. Dak., 636, 640, 641-645.

In this last case the court reviewed the question of the discretion of the court to confirm or set aside sales for inadequacy of price alone, and upheld the exercise of that discretion of the court below in setting aside a sale for inadequacy of price even "when there is nothing in the case tending to show that the sale was not fairly and legally made, or which created a suspicion that the purchaser, and every person connected with the sale, did not proceed in a fair, upright manner in making it."

As to the points heretofore urged by the appellants that there should have been offered some kind of indemnity to the bidder and a guaranty to the court of an advance bid as conditions precedent to the ordering of a resale, it is submitted that these matters are not grounds for or against granting relief by a resale, but are terms which are addressed to the discretion of the court ordering the sale, and which the court might impose or not impose, as conditions might require. It might be done either by directing a resale to be made on the condition that within a stated time after the order certain terms in those respects should be complied with, on failure whereof the bid made should stand and be accepted, or by requiring that such conditions be met before resale ordered at all.

In the case at bar there can be no call for indemnity to the bidder, for he has expended nothing on the faith of his purchase, at least nothing beyond what he pays on an appeal in which, we submit, he has no right to prevail. His offer to turn the property over to the transit company, of which company he is general manager (see signature of that company to its answer appearing on page 27, Transcript of Record), was an offer made to a party to the suit with full knowledge of the whole circumstances of the decree and sale and the character and status of the bid. Moreover, the bidder has acquired no right, value, or interest

in the property, nor has he become liable for any costs, should the resale be confirmed, save those he has incurred on this appeal.

The court might, it is true, have required a guaranty for costs to accrue on a resale if it should fail to bring a sufficiently larger sum, or might have insisted upon an actual offer of an advanced bid in a sufficient amount before ordering a resale. It does not appear that these were deemed necessary, the court rather declaring in the order for resale:

"*I am satisfied*, in the case at bar that the price or sum "bid at the commissioner's sale for the property first de- "scribed in the decree, is grossly inadequate and dispro- "portionate to the value of the property offered for sale, "and *that an amount vastly in excess of the price or sum "bid, exclusive of the expense of a new sale, can be obtained* "on a resale thereof" (Transcript of Record, page 50. Italics ours).

But at the hearing there was no suggestion of objection by the appellants in this regard. It was only when their briefs were filed that the point was made. It was then that appellees, likewise in their briefs, offered to submit to any such terms as the court might deem proper. But the court made the order for resale without such conditions. Moreover, the Supreme Court did not regard them as essential under the circumstances. And it may well be held that such matters are such as may be waived as well by the parties as by the court. (See 2 Paige (N. Y.), 102, and 10 Wis., *124.)

We hesitate, in view of the record, to mention another point, but if it be claimed that inadequacy of price was the sole ground on which appellees relied on the hearing in opposition to confirmation before the circuit court, and to sustain this there be designated the protests of the appellees (appearing on pages 44 and 46 of the Transcript of Record) as showing only that ground, we must respond that the other circumstance, the mistake of Desky as to place

of sale, was not presented to the court until after the hearing on the return of sale and on the protests had been under way several days, when Desky took the stand as a witness. It was relied upon and fully presented to both courts below, but its consideration was regarded as unnecessary by them.

Lastly, it is submitted that whether or not a judicial sale should be confirmed rests in the sound judicial discretion of the court, and its ruling should not be disturbed unless it clearly appears that such discretion has been plainly abused. And although a sale may have been regularly and fairly made, yet if in the belief of the court the price offered is clearly and grossly inadequate, and that a confirmation would be opposed to the best interests of all the parties before it and under its care for whose benefit the sale is to be made, it is not only in the discretion of the court to refuse confirmation and order a resale, but it is its duty to do so. It is not necessary that the inadequacy be traced to its cause; it is sufficient only that its result is unfair and against the interests of those in whose interest it is made.

Nugent vs. Nugent, 54 Mich., 557;
State vs. Campbell, 5 So. Dak., 636;
Phillips vs. Benson, 82 Ala., 500 (2 So., 93);
Wood vs. Parker, 63 N. C., 379;
Jennings vs. Dunphy, 174 Ill., 86;

to which cases we add the decision of our own Supreme Court in this case.

We have endeavored to show the origin, growth, and tendency of application of the rule as to inadequacy of price. It had its foundation in the settled rule of the law that a sale was a sale, and the corresponding rule of equity that in such cases sales could not be set aside by resort to equity unless some special ground for equitable interference existed. It was then never administered with respect to sales purely judicial. Then followed the blending in many jurisdictions of forms of actions, the enactment of laws for special forms

of execution and sales thereunder, the creation of statutory rights of redemption, all of which tended to mold the application of the law rule to the new forms and conditions.

It is not to be denied that there is much soundness in the view that even in purely judicial sales the inadequacy should be very gross, or that some special circumstance calling for relief should be shown before a bid, fairly made, should be rejected. There must be regarded the necessity of giving judicial sales a reasonable degree of certainty and stability to render them a fairly desirable kind of investment, and so maintain the protection and opportunity for relief that judicial sales are intended to afford to litigants who invoke them.

But, where the application of the rule would work hardship and more severely prejudice the parties for whose very interest the sale is made than would the conditions of law which gave rise to the rule itself, and where the parties cannot by some means, such as redemption after sale, save themselves, and where there exists only the very plane whence the rule had its origin, here, we submit, the issue should be tried, and the principles applied, as initially.

If the court deems it unnecessary to go further than to find that the case at bar comes within the rule approved by our Supreme Court in this case and confirms the decision now under review, the appellees urge nothing more.

It may not be necessary, in this case, to decide whether such is the limit to which the court would go in cases of this kind. If otherwise, we respectfully submit that the Federal decisions to this time seem to be cases which originated in States having statutes constituting rules of property—affecting title to real estate—which are never disregarded by the Federal courts. It is urged that while the Federal courts will exercise their equitable jurisdiction without being affected by the statutes of any State and are not bound to follow the decisions of the State courts, still they have ever regarded and molded their decisions in harmony

with such State rules of property. And where they have decided a case in the light of a statute giving a right of redemption after sale, the effect of which they necessarily take cognizance in considering the necessity for relief under equitable principles, there is a different case from that here presented. Such cases should not, we think, be regarded as establishing a set rule for application to all judicial sales. Equity has no such fixed rule that its application will be made to a certain class of cases whether or not the result will be equitable. In the words of the circuit judge in this case, after his review of the law on the subject, "it "would be unconscionable to adopt an arbitrary rule for "guidance of a court of good conscience and of equal, exact "and substantial justice, which would tie its hands and "defeat the chief purpose of its creation and existence" (Transcript of Record, page 50).

It is respectfully submitted that the decision appealed from should be affirmed.

DATED HONOLULU, TERRITORY OF HAWAII, *October* 6, 1906.

WILLIAM O. SMITH,
A. LEWIS, JR.,
F. M. HATCH,
Counsel for Appellee William O. Smith, Trustee.

L. J. WARREN,
On the Brief

Supreme Court of the United States.

No. 216.—October Term, 1906.

C. G. Ballentyne and Honolulu Rapid Transit and Land Company, Appellants,
vs.
William O. Smith, Trustee; The Pacific Heights Electric Railway Company, Limited, and C. S. Desky.

Appeal from the Supreme Court of the Territory of Hawaii.

[April 8, 1907.]

This is an appeal from a judgment of the Supreme Court of the Territory of Hawaii, 17 Haw. 96, affirming an order of the third judge of the First Circuit Court in the Territory of Hawaii, which refused to confirm a sale of property made by a commissioner under order of court in a foreclosure suit brought by William O. Smith as trustee against the Pacific Heights Electric Railway Company, Limited, a Hawaiian corporation, and directed that the property be again offered for sale. The suit was brought to foreclose a trust deed of fifty thousand dollars executed by the railway company to Smith, as trustee, on April 1, 1902, and purporting to convey an electric railway two and one-half miles in length and running up to Pacific Heights, with its equipment of every kind, and also all land and other property conveyed to it by deed from one Charles S. Desky, dated January 25, 1902.

The sale was made on February 4, 1905, for the sum of eleven hundred dollars. It was in bulk of the entire property covered by the mortgage, except a cable and condenser, which were of comparatively little value, and which, for reasons not at all affecting the merits of this controversy, were not sold with the balance of the property. The commissioner who made the sale reported that the amount realized was disproportionate to the value of the property sold, and recommended that it should not be confirmed, but that such further order should be made as to the court should seem meet in the premises. On the hearing of a motion to confirm the sale and objections thereto the trial court found that the evidence was overwhelming that the actual value of the property was at least seven times the amount at which the property was struck off, that being the highest and best bid therefor.

Mr. Justice Brewer delivered the opinion of the Court.

The question presented is whether a court of equity may, prior to any order of confirmation, set aside a foreclosure sale of mortgaged property

upon the single ground of inadequacy in price; and further, whether, if it has that power, the inadequacy here shown is so gross as to justify such action. It does not appear that there was any fraudulent conduct on the part of the purchaser or any combination to restrict bidding. The sale was duly advertised. It was, so far as disclosed, open and public, and the bid reported was the highest. Nothing in time or place or lack of attendance of buyers is shown. Many of the considerations, therefore, which have influenced courts of equity to set aside judicial sales are not to be found in the present case. Indeed, the only substantial objection is that the amount of the bid is largely below the value of the property. Something may be said on each side of the question; on the one that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that to the extent of that value the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bidding in good faith at an open and public sale to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that if the creditors make no effort and are willing to take the chances of a general attendance they have no right to complain on the ground that the property did not bring what it should have brought.

In England the old rule was that in chancery sales, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten per cent; but this rule has been rejected, and now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness. But if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. *Graffam* v. *Burgess*, 117 U. S. 180, 191, 192. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts.

It was said by Mr. Chief Justice Waite, in *Mayhew* v. *West Virginia Oil & Oil Land Company*, 24 Fed. Rep. 205, 215, "that in chancery a bidder at a sale by a master, under a decree of court, is not considered a purchaser until the report of sale is confirmed." See also *Magann* v. *Segal*, 92 Fed. Rep. 252, 255; *Jennings* v. *Dunphy*, 174 Ill. 86; *Van-*

busum v. *Maloney*, 2 Met. (Ky.) 550, 552; *Sumner* v. *Sessoms*, 94 N. C. 371; *Branch* v. *Griffin*, 99 N. C. 173. The power of a court of equity in reference to a resale was affirmed by this court in *Pewabic Mining Company* v. *Mason*, 145 U. S. 349, in which case we said (p. 356):

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and the conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted."

See also *Schroeder* v. *Young*, 161 U. S. 334.

Now, in the case before us, the commissioner who made the sale reported against its confirmation. It was not confirmed but set aside by the trial court, which found that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the bid. While the testimony is not preserved, it is stated by the Supreme Court of the Territory that it was claimed that only four years before the sale the property cost $78,000, exclusive of the right of way. It was, in fact, bonded less than three years before for $50,000. Speaking in general terms, it consisted of an electric railway two and a half miles in length, two freight cars, two passenger cars, and other appliances for running the railway. All this was sold for $1,100. The action of the trial court in setting aside the sale was approved by the Supreme Court of the Territory.

Under the circumstances, we think the order of the Supreme Court should be sustained. While we are disinclined to any action which will impair confidence in the stability of judicial sales, yet with the concurrence of judicial opinion adverse to this sale, considering the amount of property sold, the meager sum bid by the purchaser, the express finding that the overwhelming testimony was to the effect that the property was worth at least seven times more than the sum bid, and also recognizing that the courts which have passed upon this question are much more familiar with the condition of things in Hawaii, and therefore more competent to appreciate the significance of the transactions attending the sale, we have come to the conclusion that it would not be right to reverse the ruling below and confirm the sale.

The judgment of the Supreme Court of the Territory of Hawaii is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.